S253574

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LEOPOLDO PENA MENDOZA, ET AL.,

Plaintiffs and Appellants,

v.

FONSECA MCELROY GRINDING CO., INC., ET AL.,

Defendants and Respondents.

On Appeal from the Ninth Circuit Court of Appeals,
Case No.: 17-15221
United States District Court
for the Northern District of California, San Francisco
Case No. 3:15-cv-05143-WHO
The Hon. William Horsley Orrick, District Judge

RESPONDENTS' SUPPLEMENTAL MOTION FOR JUDICIAL NOTICE; DECLARATION IN SUPPORT THEREOF; [PROPOSED] ORDER

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Pursuant to Evidence Code sections 452 and 453 and California Rule of Court 8.252, Defendants and Respondents Fonseca McElroy Grinding Co., Inc. and Granite Rock Company (collectively "Respondents") hereby move the Court to take judicial notice of the documents attached hereto as Exhibits A-F, identified below, offered in support of its Respondents' Answer to Amicus Brief of DLSE. Exhibits A-F consist of Department of Industrial Relations (DIR) coverage opinion letters and decisions on administrative appeal which serve to highlight the DIR's inconsistent approach as to whether offsite work is subject to the prevailing wage law.

Judicial notice may be taken of the "[o]fficial acts of the legislative, executive, and judicial departments of . . . any state of the United States." Evid. Code § 452(c). Exhibits A through F all come within the scope of subdivision (c) as official acts of the executive branch of the State of California. Here, Respondents seek judicial notice of the following documents:

Exhibit A is a DIR coverage opinion letter, dated March 4, 2003, in Public Works Case No. 2002-064, *Off-site Fabrication by Helix Electric*, finding that offsite fabrication work at a permanent facility was subject to the prevailing wage law.

Exhibit B is a DIR coverage opinion letter, dated March 4, 2003, in Public Works Case No. 2000-027, *Cuesta College/Offsite Fabrication of Sheet Metal Work*, finding that offsite fabrication work at a permanent facility was subject to the prevailing wage law.

Exhibit C is a DIR coverage opinion letter, dated November 13, 2008, in Public Works Case No. 2007-008, *Russ Will Mechanical, Inc. Off-Site Fabrication of HVAC Components*, finding that offsite fabrication work was subject to the prevailing wage law.

Exhibit D is a May 3, 2010 DIR Decision on Administrative Appeal Re: Public Works Case No. PW 2007-008, *Russ Will Mechanical, Inc. Off-Site Fabrication of HVAC Components*, which reversed the earlier coverage

determination and found that offsite fabrication work was not subject to the prevailing wage law.

Exhibit E is a DIR coverage determination letter dated June 26, 2007 in Public Works Case No. 2005-025, *Canyon Lakes Dredging Project Lake Elsinore and San Jacinto Watersheds Authority*, finding that off-hauling of dredged material from a public works site was not subject to the prevailing wage law.

Exhibit F is a March 28, 2008 DIR Decision on Administrative Appeal Re: Public Works Case No. 2005-025, *Canyon Lakes Dredging Project Lake Elsinore and San Jacinto Watersheds Authority*, which reversed the earlier coverage determination and found that off-hauling of dredged material from a public works site was subject to the prevailing wage law.

These DIR materials were not presented to the trial court and do not relate to proceedings occurring after the order granting summary judgment in favor of Respondents which is the subject of this appeal.

Judicial notice of the documents identified above is appropriate under Evidence Code section 452, subdivision (c), as included in "executive" acts are acts performed by state agencies. *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 752-753. Judicial notice is also appropriate under Evidence Code section 452, subdivision (h), as the facts and propositions "...are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." Evidence Code § 452(h). The DIR coverage determinations letters and decisions on administrative appeal are publicly available records not reasonably subject to dispute and are capable of immediate and accurate determination.

In sum, because Evidence Code section 452 and the clear weight of authority favor granting judicial notice, the Court should grant this motion and take judicial notice of the documents attached hereto as Exhibits A-F.

Dated: February 12, 2020

SIMPSON, GARRITY, INNES & JACUZZI, P.C.

By: _____

Paul V. Simpson
Sarah E. Lucas
Attorneys for
Defendants/Respondents
Fonseca McElroy Grinding Co. Inc.

DECLARATION OF SARAH E. LUCAS

I, Sarah E. Lucas, declare as follows:

1. I am an attorney duly licensed to practice law in the State of California and before this Court. I am an attorney with the law firm Simpson, Garrity Innes & Jacuzzi, PC, counsel of record for Respondents Fonseca McElroy Grinding Co., Inc. and Granite Rock Company. I have personal knowledge of the facts set forth herein, and if called as a witness, I could and would competently testify thereto.

2. Attached hereto as **Exhibit A** is a true and correct copy of a DIR coverage opinion letter, dated March 4, 2003, in Public Works Case No. 2002-064, *Off-Site Fabrication by Helix Electric*, signed by Acting DIR Director Chuck Cake.

3. Attached hereto as **Exhibit B** is a true and correct copy of a DIR coverage opinion letter, dated March 4, 2003, in Public Works Case No. 2000-027, *Cuesta College/Offsite Fabrication of Sheet Metal Work*, signed by Acting DIR Director Chuck Cake.

4. Attached hereto as **Exhibit C** is a true and correct copy of a DIR coverage opinion letter, dated November 13, 2008, in Public Works Case No. 2007-008, *Russ Will Mechanical, Inc. Off-Site Fabrication of HVAC Components*, signed by Director John C. Duncan.

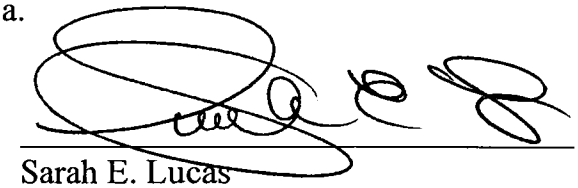
5. Attached hereto as **Exhibit D** is a true and correct copy of a May 3, 2010 DIR Decision on Administrative Appeal Re: Public Works Case No. PW 2007-008, *Russ Will Mechanical, Inc. Off-Site Fabrication of HVAC Components*, signed by Director John C. Duncan.

6. Attached hereto as **Exhibit E** is a true and correct copy of a DIR coverage opinion letter, dated June 26, 2007, in Public Works Case No. 2005-025, *Canyon Lakes Dredging Project Lake Elsinore and San Jacinto Watersheds Authority*, signed by Acting Director John M. Rea.

7. Attached hereto as **Exhibit F** is a true and correct copy of a March

28, 2008 DIR Decision on Administrative Appeal Re: Public Works Case No. 2005-025, *Canyon Lakes Dredging Project Lake Elsinore and San Jacinto Watersheds Authority*, signed by Director John C. Duncan.

I declare under penalty and perjury under the laws of the state of California that the foregoing is true and correct. Executed this 12th day of February 2020, at South San Francisco, California.



Sarah E. Lucas

EXHIBIT A

STATE OF CALIFORNIA GRAY DAVIS, *GOVERNOR*

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
455 Golden Gate Avenue, Tenth Floor
San Francisco, CA 94102
(415) 703-5050

March 4, 2003

Robert E. Jesinger, Esq.
Wylie, McBride, Jesinger, Sure & Platten
2125 Canoas Garden Avenue, Suite 120
San Jose, California 95125

Re: Public Works Case No. 2002-064
Off-Site Fabrication by Helix Electric
City of San Jose/SJSU Joint Library Project

Dear Mr. Jesinger:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws and is made pursuant to Title 8, California Code of Regulations, section 16001(a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the workers employed by Helix Electric ("Helix") to perform off-site fabrication for the San Jose State University Joint Library Project ("Project") are deemed to be employed upon public work. This determination, however, shall not be enforced retroactively on this or other applicable projects advertised for bid prior to the date this determination is posted on the Department's web site.

Facts

The City of San Jose and San Jose State University have entered into an arrangement to jointly construct and operate the Dr. Martin Luther King, Jr. Library. The Library, hailed as the first of its kind in the United States, will be a 475,000+ square-foot building, consisting of eight floors plus a mezzanine and a lower level. The total cost of the Project is $177.5 million, to be paid by multiple funding sources. The City is contributing $70 million, the State $86 million and the University $5 million, leaving $16.5 million to be contributed by private sources.

The prime contractor for the Project is Hensel Phelps Construction Co. ("Hensel"), which awarded the electrical subcontract to Helix. The subcontract includes "Section E Special Provisions for San Jose Joint Library Project and California Public Works Projects," which incorporates the provisions of California Labor Code sections 1771, 1775, 1776, 1777.5, 1813 and 1815 into the Subcontract Agreement. (*Id.*, para. 45.) It further requires Helix, prior to receiving final

payment, to sign an affidavit that it has paid the specified prevailing wages to its employees on the Project (*Id.*, para. 46) and to indemnify the contractor for any violations by Helix of the Labor Code's prevailing wage requirements. (*Id.*, para. 47.) Thus it is undisputed that the Project is a public work.[1]

The dispute in this case concerns the off-site work done by Helix on the Project. There is substantial disagreement regarding the nature and scope of this work, as well as general industry practices. According to Local 332, International Brotherhood of Electrical Workers ("IBEW"), the standard work process used by 99 percent of electrical contractors over the last 50 years entails assembly of purchased conduit, wire, transformers, lights and associated materials at a project site:

> For instance, a panel must be assembled so that the wires leading into and out of the panel all eventually run to the appropriate locations in the structure. Thus, the panel itself, as well as the wires going to and from it, would be assembled at the site of construction, the wires each cut and connected at the site, and the wires then run to a prescribed length and cut at their next connection point in the structure. In addition, in a typical construction project such as this, the conduit supports are measured and cut to the size in the field - the switches and receptacles are wired in the field, etc. (Wylie, McBride, Jesinger, Sure & Platten letter of August 14, 2002 ("IBEW Request"), p. 2.)

IBEW contends, however, that the work process utilized by Helix on the Project differs substantially from the practices of other electrical contractors:

> Instead, Helix Electric is taking work that has invariably been performed at the site of construction, and having such work transferred to its shop in San Diego to maximize to a degree that has never been reached before the amount of off-site work. This off-site activity is in no way the production of generic components of an electrical system which could be used in any given project.

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[1] As construction done under contract and paid for with public funds, the Project also constitutes a public work under what is now Labor Code section 1720(a)(1).

> Instead, the "production" processes utilized by Helix in its San Diego shop involve taking directly from the architectural plans of this project, the precise specifics of each and every component of the electrical system that must be fabricated in order to fit into the project, measuring how each such component will be assembled . . ., and having each point of assembly of panels, pipe bends, raceway trapezes, raceway ceiling rack supports, receptacle plates, fixture whips, and even down to the lengths of wire, precut and specially fashioned and assembled for installation at this project only. (*Ibid.*)

Helix disputes IBEW's characterization of the off-site work on the Project. Helix submitted a declaration by Dan Zupp, Vice President of its Buildings Division. According to Zupp, that division has been in business for over seven years and has fabricated and sold electrical systems for dozens of customers over that period. (Zupp Declaration, p. 2, para. 5.) Zupp adds:

> The Division has a permanent staff of mechanics and welders and numerous machines and a machine shop that creates fabricated electrical systems. It has a catalogue of products that it creates in the normal course of business. . . . Contrary to the union's assertions . . . the components assembled at the Division could be used for virtually any Helix project as is or, in a few instances, with slight modification. The products are generic and interchangeable with other projects. Less than five percent of the labor for the Project is performed at the Prefabrication Facility. (*Id.*, para. 6.)

IBEW submitted a declaration by Jay James, an IBEW organizer. James declares:

> Helix Electric supervisors keep a binder on the site with all of their prefabrication order sheets. A Helix supervisor would use the plan specifications to draw the item which was to be fabricated, along with its dimensions, on to a fabrication order form. This form would then be faxed to the Helix fabrication facility in San Diego. (James Declaration, p. 3, para. 7.)

Zupp responds, "Helix supervisors may very well have a catalogue of generic products which the Division makes." (Zupp Declaration, p. 8, para. 13.) He declares that in fact his division does have "a catalogue of products that it creates in the normal course of business. Enclosed are a few sample pages from its product catalogue . . . ." (Zupp Declaration, p. 2, para. 6.)

The sample pages provided by Zupp are all headed: "Fabrication Order Form." Each contains a diagram of a specific product and blanks to be filled in, specifying such things as quantity, date needed and budgeted hours. Some of the sheets, for items such as kick-in box brackets and prefab panels, have additional blanks to be filled in specifying dimensions and/or special features. (Attachment 2 to Zupp Declaration.) Attachment 1 to the James Declaration consists of similar "Fabrication Order Forms." However, these forms are not pre-printed for particular products, but rather have a blank space in the center where apparently the person ordering the product has provided a drawing with dimensions and specifications for the product to be fabricated.

Zupp declares that sophisticated electrical contractors, both union and non-union, have for many years utilized permanent prefabrication yards to assemble many electrical components to be shipped to construction projects. (*Id.*, para. 7.) He further states that identical types of electrical components are assembled by "non-contractor electrical component prefabricators," and provides brochures from several of them. (*Id.*)

Zupp states:

> All products, whether pre-assembled by a contractor and/or by a prefabrication off-site company . . . must meet the design criteria of the plans and specifications. Most electrical specifications, if not all, are fairly generic by nature and require that all materials incorporated into the project be in accordance with UL Standards and National Electrical Code . . . . As such, a component either assembled by a contractor and/or by an industry leader in prefabricated systems . . . is essentially a "generic component" which can be incorporated on any project whether public or private. (*Id.*, p. 6, para. 10.)

The parties differ with regard to the scope of the off-site work on the Project. IBEW contends that "a very substantial portion of the work, perhaps more than 50 percent of the total work involved"

is being done off-site. (IBEW Request, p. 2.) Helix responds that "less than five percent of the total work on any given project, including [this] Project, incorporates prefabricated and/or pre-assembled products. (Zupp Declaration, p. 7, para. 11.)

Despite the disputed facts discussed above, certain facts appear to be undisputed. First, Helix does off-site fabrication of products for use in its own construction projects, and not for sale in the general market. Second, personnel at the public works job site fill out "Fabrication Order Forms," in at least some cases inserting specifications for the product being ordered. Third, Helix acknowledges that some labor for the Project was performed at its Prefabrication Facility. (Zupp Declaration, para. 6.)

Positions of the Parties

IBEW argues that the off-site fabrication work for this Project is covered by Labor Code section 1772,[2] which provides that: "Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon the public work." IBEW contends:

> The language of [section 1772], combined with the utter absence of any requirement in the California Labor Code that the prevailing wage laws apply only to *on-site* work, strongly suggests that if a contractor or subcontractor is itself engaged in a public works project, then any of its employees who are engaged "in the execution" of that contract are "deemed to be employed upon public work." Although we do not argue that section 1772 means that any such employee must be deemed to be employed upon a public work, the language of this statute clearly suggests that the location of where the work is actually performed is not determinative of whether prevailing wage laws apply. (IBEW Request, pp. 3-4.)

Helix responds that, "California courts have consistently turned to the federal Davis-Bacon Act for guidance in interpreting California's prevailing wage law. This is established legal doctrine." (Shepard, Mullin, Richter & Hampton LLP letter of

[2] Subsequent statutory references are to the Labor Code unless otherwise indicated.

November 1, 2002 ("Helix Response"), p. 3.) The only court case cited by Helix is *O.G. Sansone v. Department of Transportation* (1976) 55 Cal.App.3d 434 ("*Sansone*").[3] Helix asserts that under the *Sansone* analysis, prefabrication work done at permanent off-site facilities of contractors is not covered under California's prevailing wage law.

Helix asserts that IBEW wants to redefine the scope of public works to include permanent fabrication facilities, and that "[t]his would throw the public works construction industry into practical chaos as well as legal chaos." (Helix Response, p. 4.)

Discussion

Section 1720(a) generally defines "public works" to include construction "done under contract and paid for in whole or in part out of public funds." As stated above, section 1772 provides that: "Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work." A threshold issue in this case is whether the *Sansone* decision limits the coverage of off-site fabrication under section 1772. For the reasons discussed below, it does not.

In *Sansone*, trucking companies hauled sub-base material to a state highway construction project from locations adjacent to and established exclusively for the highway project. The material was purchased by the prime contractor, which then contracted with trucking firms to haul the sub-base to the project. The material was dumped directly onto a roadbed, where workers on the project incorporated the material into the roadbed. The trucking companies were found to be subcontractors for two principal reasons. First, the materials they delivered were acquired from third party locations adjacent to and established exclusively for the project site, and, second, the trucking companies were hired

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[3] Helix also cites several coverage determinations that cited *Sansone* in drawing a distinction between temporary and permanent off-site fabrication facilities. However, none of these cases is precedential, and Helix therefore may not rely upon them. Helix does cite two installation cases that are precedential. However, these cases also provide no support for Helix because the question presented therein was simply whether installation of prefabricated products was covered, and not whether the fabrication itself was covered. (*Lozano Caseworks, Inc./Installation of Prefabricated Cabinets*, PW 99-069 (June 26, 2000); *Valley View Elementary School/Installation of Signage by Marketshare, Inc.*, PW 99-034 (September 29, 1999).)

by the prime contractor to perform an integral part of the prime contractor's obligation under the prime contract.

In analyzing whether the trucking company was a subcontractor, the court adopted the United States Secretary of Labor's administrative interpretations of the Davis-Bacon Act's exclusion of material suppliers from statutory coverage. The court set forth three principal criteria for the denomination of material supplier. First, a material supplier must be in the business of selling supplies to the general public. Second, the plant from which the material is obtained must not be established specially for the particular contract. Third, the plant may not be located at the site of the work. Additionally, the court quoted with approval a Wisconsin case: "However, if the materials hauled were immediately utilized on the improvement, the drivers were covered regardless of the source of the material." (55 Cal.App.3d at 444, quoting *Green v. Jones*, 128 N.W.2d 1, 6.)

In *Sansone,* the issue decided was whether the trucking company was a material supplier. In this case, however, the fabrication work is done by a company that also does on-site work on the Project and is clearly a subcontractor. Additionally, *Sansone* relies on federal cases construing the Davis-Bacon Act, which has language not found in the Labor Code expressly limiting its application to the construction site. Since *Sansone* held the work in question to be covered under the more restrictive federal standard, it was unnecessary for the court to address the differences in language of the federal and state statutes. For similar reasons, the Department has occasionally followed *Sansone* in finding off-site fabrication covered.[4] However, neither *Sansone* nor Department determinations constitute precedent for the proposition that off-site fabrication by an acknowledged subcontractor is not covered unless done in a temporary or specially set up facility. Indeed, a recent precedential determination extended coverage to off-site work in a permanent general-use facility, although the work did not entail fabrication.[5]

The question whether state prevailing wage laws, particularly concerning language similar to section 1772, must be construed in conformity with the Davis-Bacon Act has not been directly

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[4] *San Diego City Schools/Construction of Portable Classrooms,* PW 99-032 (June 23, 2000).

[5] *Sacramento State Capitol Exterior Painting Project/Restoration and Hauling of Decorative Cast Iron Elements,* PW 2002-034 (July 18, 2002).

addressed by the California courts, but has been decided in several other states. For example, *Sharifi v. Young Brothers, Inc.* (Tex.App. 1992) 835 S.W.2d 221 ("*Sharifi*"), held that the Texas prevailing wage law covered truck drivers delivering materials from a contractor's storage facility to a highway construction site. The case is particularly instructive because the relevant statute, Tex. Rev. Civ. Stat. Ann. Art. 5159a, section 1, contains language virtually identical to California Labor Code sections 1771 and 1772:

> Not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the work is performed, and not less than the general prevailing rate of per diem wages for legal holiday and overtime work, shall be paid to all laborers, workmen and mechanics . . . engaged in the construction of public works, exclusive of maintenance work. *Laborers, workmen, and mechanics employed by contractors or subcontractors in the execution of any contract or contracts for public works . . . shall be deemed to be employed upon public works.* (Emphasis added).

The court rejected the contractor's argument that the state statute should be interpreted in the same manner as the Davis-Bacon Act:

> The intention of the Legislature must be ascertained from the language of the statute, if possible. . . .
>
> The problem lies in the Legislature's failure to define the phrase "in the execution of any contract," which is the provision limiting the statute's coverage. Because it did not define the term "execution," a word of common usage, we must give it its ordinary and common meaning. [Citation omitted.] Black's Law Dictionary defines "execution" as "the completion, fulfillment, or perfecting of anything, or carrying it into operation and effect." Black's Law Dictionary p. 510 (5th ed. 1979). Based on this definition, we conclude that the Legislature intended that employees delivering materials to a Texas public-works construction site be included within the coverage of the Act. Young Brothers' construction contracts could not have been completed without

> materials being delivered to the work site. *Sharifi's* work was as directly related to and as essential to completion and fulfillment of the contracts as the work of employees using the materials at the job site.
>
> Young Brothers asserts, however, that article 5159a should be construed in the same manner as the federal Davis-Bacon Act, which requires contractors to pay prevailing wage rates to employees "employed directly upon the site of the work." See 40 U.S.C. § 276a (West 1986). . . .
>
> When a federal statute is adopted in a statute of this state, a presumption arises that the Legislature knew and intended to adopt the construction placed on the federal statute by federal courts. [Citation omitted.] This rule of construction is applicable, however, only if the state and federal acts are substantially similar and the state statute does not reflect a contrary legislative intent. [Citations omitted.]
>
> After comparing the two statutes, we conclude that their coverage provisions are not substantially similar and that the Legislature clearly intended to broaden the coverage of article 5159a when it selected the phrase "in the execution of any contract" rather than the phrase "employed directly upon the site of the work" found in the federal Act. The federal Act is by its plain language more restrictive in its coverage than the Texas Act. Under the circumstances, we must determine and follow the intent of the legislature when it adopted a statute with obviously broader coverage. (*Sharifi, supra,* 835 S.W.2d at 222-223.)

In *Everett Concrete Products, Inc. v. Department of Labor and Industries* (1988) 748 P.2d 1112, 109 Wn.2d ("*Everett Concrete*"), the Washington Supreme Court used a similar analysis in holding that its state's prevailing wage law applied to off-site fabrication of products "specially made" for a particular public works project. The project in question was the construction of a tunnel for an interstate highway in Seattle. Because the earth at the tunnel site was loose and could not be excavated by traditional methods, the prime contractor designed and utilized concrete tunnel liners to provide a supportive ring in the tunnel

during excavation. The prime contractor contracted Everett Concrete Products ("ECP") to manufacture the tunnel liners. ECP agreed to manufacture 30,000 lineal feet of liners in accordance with measurements specified by the prime contractor and the Department of Transportation. ECP manufactured the liners on special forms built to meet the size and measurement requirements of the tunnel. The liners were manufactured at ECP's plant in Everett, and were delivered to the project site by trucking companies contracted by the prime contractor. (*Everett Concrete, supra,* 748 P.2d at 1112-1113.)

Upon inquiry by a labor organization, the Department of Labor and Industries determined that the prevailing wage law applied to the work done by ECP. ECP challenged the determination, which was upheld by an administrative law judge. ECP appealed directly to the State Supreme Court. The Court engaged in *de novo* review, while according substantial weight to the agency interpretation. (*Id.* at 1113.)

The relevant statute, RCW 39.12.020, provided in part that: "The hourly wages to be paid to laborers, workmen or mechanics, *upon all public works* . . . shall be not less than the prevailing rate of wage . . . .." (Emphasis supplied.) The Court began its analysis by recognizing that the prevailing wage law was remedial and should be construed liberally to carry into effect the purpose of the statute. The Court found, as with the Davis-Bacon Act, that purpose was "to provide protection to local craftsmen who were losing work because contractors engaged in the practice of recruiting labor from distant cheap labor areas." (*Everett Concrete, supra,* 748 P.2d. at 1114, quoting *Southeastern Washington Building & Construction Trades Council v. Dept. of Labor & Industry* (1978) 586 P.2d 486, 91 Wash.2d 411, 415.) The Court held that, "This purpose will be served by extending the application of RCW 39.12 to off-site manufacturers involved in public works by preventing contractors from parceling out portions of the work to various off-site manufacturers as a means of avoiding the prevailing wage requirement." (*Ibid.*)

The Court also recognized the cannon of statutory construction that "when the legislature of a state adopts a statute which is identical or similar to one in effect in another state or country, the courts of the adopting state usually adopt the construction placed on the statute in the jurisdiction in which it originated." (*Ibid.*, quoting 2A N. Singer, *Statutory Construction* 52.02 (4th ed. 1984).) While noting that Washington's prevailing wage law is based on the Davis-Bacon Act,

the Court also noted that the state law was not identical to Davis-Bacon in that it did not contain the phrase "mechanics and laborers employed *directly* upon the site of the work" found in 40 U.S.C. 276a." (*Everett Concrete, supra*, 748 P.2d at 1115, emphasis provided by the Court.) The Court therefore concluded that it "need not adopt the construction placed on a similar statute in another state if the language of the statute in the adopting state is substantially different from the language in the original statute." (*Ibid.*, citing Singer, *supra*.) "[A] provision of the federal statute cannot be engrafted onto the state statute where the Legislature saw fit not to include such provision." (*Ibid.*, quoting *Nucleonics Alliance, Local 1-269 v. WPPSS* (1984) 677 P.2d 108, 101 Wn.2d 24, 34.) The Court held that the omission of the word "directly" from the state statute "leads to the conclusion that the Legislature intended the scope of the state prevailing wage law to be broader than that of the Davis-Bacon Act." (*Ibid.*)

The Court quoted with approval a 1967 Attorney General's Opinion, which states:

> The requirement of chapter 39.12 RCW that the "prevailing rate of wage" be paid to laborers, workmen or mechanics upon all public works of the state, or any county, municipality or political subdivision, is applicable to labor performed in an off-the-job-site prefabrication by employees of the prime contractor, subcontractor, or other persons doing or contracting to do the whole or any part of the work contemplated by the contract, provided that the prefabricated "item or member" is produced specially for the particular public works project and not merely as a standard item for sale on the general market. (*Ibid., quoting* AGO 15, at 10.)

The Court concluded:

> RCW 39.12.020 provides that prevailing wages must be paid to workers "upon all public works." This language must be construed to require application of the prevailing wage requirement to off-site manufacturers, when they are producing nonstandard items specifically for a public works project. In this way the use of cheap labor from distant areas is avoided and the purpose of RCW 39.12 is not circumvented. (*Everett Concrete, supra*, 748 P.2d. at 1118.)

The Montana Attorney General has similarly concluded that off-site fabrication is covered by that state's prevailing wage law. The Montana Commissioner of Labor and Industry had determined that "the Montana prevailing wage statute has the same geographical scope of work coverage as the Secretary of Labor's regulations defining the term 'site of the work' under the Davis-Bacon Act." (47 Opinions of the Montana Attorney General, Opinion No. 12 (March 31, 1998).) In its opinion, the Attorney General rejected that interpretation:

> The 1931 Montana statute was comparable to the Davis-Bacon Act in its original form insofar as the state law used the terms "construction, repair and maintenance" in describing the general scope of the public contracts covered and did not limit the employees covered to those performing work directly on the project site. The legislature has never adopted the "employed directly upon the site of the work" language added to the federal act in 1935. A 1975 amendment to the Montana statute does require employers to post statements of prevailing wages "in a prominent and accessible site on the project or work area," but, as the disjunctive "or" suggests, the term "work area" may include areas other than a construction project itself. 1975 Mont. Laws ch. 531, § 1 (codified at Mont. Code Ann. § 18-2-406).
>
> . . .
>
> As presently codified in § 18-2-403(2), the prevailing wage requirement extends to any "public works contract" without the limiting site-specific language of the Davis-Bacon Act. Although the 1931 legislature may have intended the state statute to have the same general scope as the federal act, both laws have undergone substantial modification over the nearly 70 years since their enactments and now bear little resemblance to one another except to the extent each is directed at requiring that certain minimum wage levels be paid for work under particular classes of government contracts. . . .
>
> I recognize that the Commissioner of Labor and Industry has concluded the prevailing wage requirement extends only to construction services performed at the job site or nearby property. The Commissioner's interpretation of a statute

> committed to her agency's enforcement often is entitled to substantial deference. . . . Nevertheless, here a literal reading of § 18-2-403(2) does not support a job-situs limitation, and I therefore decline to defer to the Commissioner's construction of § 18-2-403(2)(b). . . . I cannot supply a restriction unsupported by the language of the law itself. . . .
>
> Finally, no reasonable dispute exists that a contractor's off-site fabrication of items for on-site installation constitutes "construction" within the scope of the term "construction services." Even on the most basic definitional level, such activity involves "[t]he process or art of constructing; the act of building; erection; the act of devising and forming; fabrication; composition." Webster's II: New Riverside Univ. Dictionary (1988) <http://www.nbc-med.org/dictionary.html>. (*Id.*)

For these reasons, the opinion concluded that:

> The prevailing wage requirements in Mont. Code Ann. § 18-2-403(2)(b) apply to fabrication of materials performed off-site by a contractor for installation or use at the site of construction under a public works contract. The prevailing wage district with respect to such off-site services is the district where the on-site construction occurs. (*Id.*)[6]

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[6] There is also a federal case in accord with the above state opinions. In *Griffin v. Reich* (D.R.I. 1997) 956 F.Supp. 98 ("*Griffin*"), the court addressed the scope of coverage under the Housing Act of 1937, 42 U.S.C. sections 1437 *et seq.* 42 U.S.C. section 1437j provides that Davis-Bacon prevailing wages "shall be paid to all laborers and mechanics *employed in the development of the project.*" (Emphasis supplied.) The Housing Act thus does not expressly limit coverage to work directly on the site of the public work, as does Davis-Bacon.

In *Griffin*, Phoenix-Griffin Group II, Ltd. and the Providence Housing Authority entered into a contract for the construction of 92 units of scattered site, low-income housing. Phoenix-Griffin contracted with a subcontractor, who used an off-site facility to construct sections of the housing units being built, which were then transported to the scattered sites for installation. The Housing Authority, on the advice of HUD, took the view that the off-site work was not covered so long as it was not performed at "a temporary plant set up elsewhere to supply the needs of the project and dedicated exclusively, or nearly so, to the performance of the contract or project." (*Id.* at 101.)

Sharifi, *Everett Concrete* and the Montana Attorney General Opinion provide persuasive authority for the proposition that coverage of off-site fabrication under California law cannot be limited to the scope of the Davis-Bacon Act. All three adhere to the literal language of their states' prevailing wage laws in concluding that coverage is not limited to the site of the public works project. All conclude that the state law cannot be limited to the scope of Davis-Bacon when the state language is more inclusive. The Montana Attorney General went so far as to reject the interpretation of the Commissioner of Labor and Industry, even while acknowledging that her interpretation of a statute committed to her agency's enforcement was entitled to substantial deference, because he could not supply a restriction not supported by the language of the statute.

California courts have similarly recognized that they must accord substantial deference to the Director of DIR in interpreting the California prevailing wage law. *See International Brotherhood of Electrical Workers v. Aubry* (1996) 41 Cal.4th 1632, 1638, 49 Cal.Rptr.2d 759. However, here as in Montana, such deference does not extend to importing into the statute an on site restriction that is not supported by its language. California law, like that of Texas, Washington and Montana, does not limit coverage to the site of the public works project, and it would be

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Subsequently the Wage and Hour Division of the Department of Labor determined that prevailing wages should have been paid for the off-site work and issued findings of violations, which were the subject of a hearing before an administrative law judge ("ALJ"). The ALJ upheld the Wage and Hour Division's determinations, finding that the off-site work was subject to prevailing wages, in part because the workers were "employed in the development of the project" within the meaning of the statute. The Wage Appeals Board later affirmed that part of the ALJ's decision. The matter was appealed to the federal district court, which held that:

> [B]y statute, the Department of Labor is the final arbiter of the Housing Act's interpretation with respect to Davis-Bacon coverage. See Reorg. Plan No. 12 of 1950; 42 U.S.C. 1437(j) (1994). The interpretation of the Department of Labor, which is based on the plain language of the Housing Act, does not contravene clear Congressional intent. Moreover, even if the statute were viewed as somehow unclear, such an interpretation is not "impermissible." Therefore, the interpretation set forth by the Department of Labor is the controlling one. (*Id.* at 105.)

erroneous to construe it as doing so.[7] Here, as in Texas, under Section 1772, coverage extends to workers employed by contractors or subcontractors in the execution of a contract for public work, and is not limited to the site of the public works project.

Here as in Washington, one of the purposes of the prevailing wage law is to "protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas." *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987, 4 Cal.Rptr.2d 837. Here as in Washington, that purpose is served by requiring payment of prevailing wages for off-site fabrication performed in the execution of a contract for public work.

Everett Concrete articulated a reasonable test for coverage of off-site fabrication: The work is covered if the prefabricated item or member is produced specially for the public works project; it is not covered if the item fabricated is merely a standard product for sale on the general market. Such a test fits well with the language of Section 1772.

Accordingly, the following test for coverage of off-site fabrication under Section 1772 is adopted: Workers employed by contractors or subcontractors are employed in the execution of a contract for public work when they are engaged in the off-site fabrication of items produced specially for the public works project and not for sale on the general market. In this case, there is no question that the items prefabricated by Helix employees are produced specially for the Project because Helix does not produce items for sale on the general market. Indeed, Helix pointedly differentiated electrical contractors such as itself that prefabricate items for their own projects from "non-contractor electrical component fabricators" that produce items for sale on the general market.[8]

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[7] Additionally, in 2000, the Legislature amended Section 1720(a) to provide that: "For purposes of this subdivision, 'construction' includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work." This amendment is further evidence of a legislative intent that the state prevailing wage law be broader in its coverage than the federal Davis-Bacon Act.

[8] A scenario not present here is if Helix were producing items both for its own projects and for sale on the general market. Under such circumstances, the test for whether a prefabricated item is specially made for the public works project would turn on factors such as whether the item was produced in accordance with the plans and specifications of the architects and/or engineers for that project and/or the shop drawings such that the item differs

When off-site workers specially produce fabricated or prefabricated products for use in a public works project, Section 1772 requires that they be paid prevailing wages. This is in accord with the proposition recognized in California that prevailing wage laws are to be liberally construed in furtherance of their purposes. (*Walker v. County of Los Angeles* (1961) 55 Cal.2d 626, 634-635; *Cassaretto v. San Francisco* (1936) 18 Cal.App.2d 8, 10.)

While this determination clarifies the test for whether off-site fabrication is covered by California prevailing wage law, it will not be enforced retrospectively to this or other applicable projects advertised for bid prior to the date the determination is posted on the Department's web site. Accordingly, Helix will not be liable for prevailing wages or penalties for workers engaged in off-site fabrication for this Project.

Conclusion

For the foregoing reasons, prevailing wages must be paid employees of contractors and subcontractors engaged in the off-site fabrication or prefabrication of items specially produced for public works projects advertised for bid after the date that this determination is posted on the Department's web site.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

Chuck Cake

Chuck Cake
Acting Director

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from a standard, generic item. Even such a standard, generic item would be considered to be produced specially for the public works project if it was modified to meet the specific requirements of that project.

EXHIBIT B

STATE OF CALIFORNIA
GRAY DAVIS, *Governor*

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
455 Golden Gate Avenue
San Francisco, CA 94102

March 4, 2003

Mark S. Renner, Esq.
Wylie, McBride, Jesinger, Sure & Platten
2125 Canoas Garden Avenue, Suite 120
San Jose, California 95125

Re: Public Works Case No. 2000-027
Cuesta College/Offsite Fabrication of Sheet Metal Work

Dear Mr. Renner:

This letter constitutes the determination of the Director of the Department of Industrial Relations regarding coverage of the above-named project under the public works laws and is made pursuant to Title 8, California Code of Regulations ("CCR"), section 16000(a). Based upon my review of the information submitted and the applicable laws and regulations, it is my determination that the workers employed by J.R. Barto Heating, Air Conditioning, Sheet Metal, Inc. ("Barto") to perform certain off-site fabrication in conjunction with the construction of the Air/Music Laboratories Addition and the Classroom/High Tech Learning Center at Cuesta College in San Luis Obispo ("Project") are deemed to be employed upon public work. This determination, however, shall not be enforced retroactively on this or other applicable projects advertised for bid prior to the date this determination is posted on the Department's web site.

Facts

Barto is the subcontractor responsible for the installation of the heating, ventilation and air conditioning ("HVAC") systems on the Project. Section 15500, paragraph 102 of the bid specifications for the HVAC work defines the scope of work as follows:

> The work includes the furnishing of all labor, materials, appliances and tools necessary for the installation, in complete working order, of the Heating, Ventilating and Air Conditioning System as herein specified and as indicated on the drawings. The items of work shall include, but shall not be limited to, the following principle [sic] items:

1. Equipment including, boilers, pumps, air-conditioning units, tempered make-up air unit, kitchen hood exhaust and make-up units, exhaust fans, etc. as indicated on the drawings.
2. Air distribution system, including ductwork, diffusers, registers, dampers, etc.
3. Hot Water piping system including valves, fittings, and expansion tanks.
4. Refrigerant piping system including valves, sight glasses and fittings.
5. Insulation for ductwork and piping.
6. Condensate drain piping from air-conditioning units to drain receptors
7. Exhaust systems including fans, drives, ductwork, registers, etc.
8. Miscellaneous hangers, supports, sleeves, inserts, isolators, flexible connections, seismic bracings, and other auxiliary equipment for all systems under this section.
9. Equipment identification, operations, and maintenance instructions.

Paragraph 1.04 of the specifications states: "Names of selected manufacturers have been specified for all items of equipment and materials. Bids shall be based on the use of the product of one of the selected manufacturers, and only such products may be submitted for approval." The specifications consist of many pages detailing the manufacturers and product numbers of particular equipment and materials to be used.

Ductwork is to be fabricated to field measurements established by the Contractor on the job, and ducts are to be in sizes and configurations shown on the drawings. (Paragraph 3.03.B.) If necessary duct dimensions are omitted from the drawings, the Contractor is required to notify the Architect, who is to supply the dimensions, whereupon the Contractor is required to construct the ducts in accordance with those dimensions at no extra charge. (Paragraph 3.03.D.)

Barto has done off-site fabrication in its own shop since 1988. The shop, located in Lompoc, was not established for this particular project, but rather is utilized for various residential, commercial and public works projects. The shop fabricates materials not only for Barto's own projects, but also

for sale to other contractors, and occasionally for the general public. (Joseph R. Barto Letter of January 17, 2001.) Barto states that off-site fabrication is approximately 17% of the total dollar value of the project. Of the off-site fabrication, 15% is fabricated by Barto and 85% is fabricated by three sheet metal production shops. (*Id.*)

Positions of the Parties

Union

In support of the proposition that the off-site sheet metal fabrication for the Project is public work, Sheetmetal Workers Union Local 273 ("Union") argues the Director has discretion to determine that off-site fabrication work is covered under the prevailing wage laws. Such coverage need not be limited to the facts of *O.G. Sansone v. Department of Transportation* (1976) 55 Cal.App.3d 434 ("*Sansone*").

The Union asserts the work performed by a mechanical ("HVAC") contractor is unique in the relationship between work on and off the site of construction. The material fabricated for an HVAC system must be made specifically for that particular job, rather than purchased "off the shelf." The prevailing practice in the industry is for the mechanical contractor to have its own employees perform both the off-site fabrication of the sheet metal and the on-site installation of it. Moreover, if the fabricated material does not meet the requirements of the job, the material may be taken back to the shop to rework the fabrication. Thus, "the relationship between the on- and off-site work, the communication between the employees performing those two portions of the work, and the continuous nature of the work flow all comprise one integrated process . . .." (Letter of November 29, 2000, from Mark S. Renner to Director Stephen Smith, p.4.)

Barto

Barto contends because it performs off-site fabrication in a permanent shop, which is not dedicated exclusively to the public works job, the fabrication should not be covered in light of the *Sansone* case. Barto further argues if the Union's position were adopted, the off-site work of other trades, including plumbing, electrical and carpentry work, would also have to be examined.

The Department invited several organizations with varied interests to comment. Below is a summary of the responses received:

CAL SMACNA

The California Association of Sheet Metal and Air Conditioning Contractors ("CAL SMACNA") is an association of local chapters, contractor member firms, and associate members. The member firms are contractors signatory to Union agreements. CAL SMACNA submitted a brief response stating a general consensus of its chapters in support of coverage of off-site fabrication, contingent on a fair and consistent policy for enforcement.

Tri-Counties SMACNA

The SMACNA chapter located in Ventura, Santa Barbara and San Luis Obispo Counties submitted a detailed response that generally paralleled the Union's position. Tri-Counties SMACNA agrees with the Union's contention that an HVAC contractor is engaged "in the execution of" a public works contract within the meaning of Labor Code section 1772,[1] whether the work is performed on- or off-site.

Tri-Counties SMACNA states, "Although it is generally possible to purchase any type of material needed to complete a construction project, an HVAC contractor is substantially different than other contractors . . .. Unlike electrical, drywall or roofing contractors that purchase from standard materials catalogs, an HVAC contractor fabricates his material specifically for the project. This is not to say that all items required for a project's completion will be fabricated in the HVAC contractor's off-site facility, he may also purchase standard catalog items from a material supplier."

Additionally, Tri-Counties SMACNA states: "Unfortunately, the need to 'rework' material provided to the job-site is a reality on all construction projects, public or private. Material not meeting the job requirements must be returned to the fabrication facility for modification and returned to the job-site. There is a high degree of communication required between the job-site and the off-site shop facility. The continuing relationship between the two locations requires a unique relationship to ensure a continuous flow of work consistent with the on-site needs."

[1] All statutory section references are to the Labor Code.

Construction Employers' Association[2]

The Construction Employers' Association ("CEA") urges the Director to approach the issue with caution, contending that the determination requested by the Union would affect all contractors and public entities in California, and would "create chaos on all public works projects." CEA suggests that at minimum the Director should conduct a public hearing before issuing a determination. It then presents a comprehensive response to the Union's contentions.

CEA first contends, while the Director has broad discretion, the expansion of the prevailing wage law to cover off-site work is more appropriately a job for the Legislature. It argues what the Union is seeking is not just a determination for this specific project, but a rule of general application which would affect hundreds, if not thousands, of contractors and public entities. As such, it would amount to a regulation subject to the requirements of the Administrative Procedure Act ("APA"), Gov. Code sections 11340 et seq. CEA asserts the determination sought by the Union would have an adverse impact on all contractors who perform work off-site, most of whom are small businesses.

CEA further asserts the Director's discretion is limited by the language of the relevant statutes and regulations. It contends under section 16002 of the regulations, the Director's authority to make coverage determinations is limited to "crafts, classifications or types of workers employed in public works as set forth in Sections 1720, 1720.2, 1720.3, and 1771 of the Labor Code." Section 16000 of the regulations defines "public works" by reference to sections 1720, 1720.2, 1720.3 and 1771 of the Labor Code. None of these sections mentions off-site fabrication of materials. Moreover, Labor Code section 1772 is not one of the sections listed in CCR sections 16000 and 16002. Therefore, the Director lacks authority to issue a determination that the work is covered.

CEA cites *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 4 Cal.Rptr.2d 837, 851-852, for the proposition that in interpreting the prevailing wage law, courts "look at the statutory scheme as a whole in order to harmonize the various elements." CEA asserts that the statutory scheme contemplates

[2] Associated Builders and Contractors, Inc., Golden Gate Chapter ("ABC") and its Apprenticeship and Training Program submitted a letter taking a position similar to that of CEA. Due to this similarity, ABC's position does not require separate discussion. It should also be noted that the Department attempted unsuccessfully to contact the Air Conditioning Trades Association ("ACTA"), an organization of non-signatory contractors.

coverage be limited to on-site work, noting for example that section 1773.2 requires awarding bodies to post a copy of the prevailing wage determination "at each job site." While an awarding body can easily do such posting at a public works site it controls, the same cannot be said of an off-site shop.

CEA contends that *Sansone* is controlling authority, noting it has been relied upon in precedential determinations such as Alameda Corridor Project, PW 99-037, April 10,2000. Applying the *Sansone* criteria, CEA asserts that in the sheet metal industry the fabrication work is not done at shops created for each project, the location of the shop is unrelated to the location of the project, and materials fabricated in the shop may be sold to others.

Discussion

It is appropriate to address at the outset CEA's contention that this subject matter should be addressed through the rulemaking process rather than through a coverage determination. The determination whether a project is a public work is entrusted to the Director of Industrial Relations. That determination is quasi-legislative and is part of the overall worker classification and rate setting function of the Department.[3] More specifically, the determination whether a particular project is covered is essential to the worker and rate determinations and does not require regulations. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 127, 174 Cal.Rptr. 744. In *Winzler*, the Court clearly and explicitly held that:

> Labor Code section 1773 provides the method to be used by the Director in determining general prevailing rates. In this determination the Director shall fix the rate for each craft, classification or type of work. Thus, the determination of the classification or type of work covered is an essential step in the wage determination process and a rate cannot be fixed without such a determination. As the wage determination process is exempted from the prior hearing requirements of the APA, coverage

[3] For a full description of these functions, see *Independent Roofing v. Department of Industrial Relations* (1994) 23 Cal.App.4th 345, 351-353, 28 Cal.Rptr.2d 550.

> determination, as an integral part of that process, is also exempted.

The Director's determination in this matter is therefore not required to comply with the Administrative Procedure Act. (See also, *Independent Roofing Contractors v. Department of Industrial Relations* (1994) 23 Cal.App.4th 345, 352, 28 Cal.Rptr.2d 550, 554.)

What is now Section 1720(a)(1) generally defines "public works" to include construction "done under contract and paid for in whole or in part out of public funds." Section 1772 provides that: "Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work." A threshold issue in this case is whether the *Sansone* decision limits the coverage under section 1772 of off-site fabrication of the HVAC materials for the Project. For the reasons discussed below, it does not.

In *Sansone*, trucking companies hauled sub-base material to a state highway construction project from locations adjacent to and established exclusively for the highway project. The material was purchased by the prime contractor, which then contracted with trucking firms to haul the sub-base to the project. The material was dumped directly onto a roadbed, where workers on the project incorporated the material into the roadbed. The trucking companies were found to be subcontractors for two principal reasons. First, the materials they delivered were acquired from third party locations adjacent to and established exclusively for the project site, and, second, the trucking companies were hired by the prime contractor to perform an integral part of the prime contractor's obligation under the prime contract.

In analyzing whether the trucking company was a subcontractor, the court adopted the United States Secretary of Labor's administrative interpretations of the Davis-Bacon Act's exclusion of material suppliers from statutory coverage. The court set forth three principal criteria for the denomination of material supplier. First, a material supplier must be in the business of selling supplies to the general public. Second, the plant from which the material is obtained must not be established specially for the particular contract. Third, the plant may not be located at the site of the work. Additionally, the court quoted with approval a Wisconsin case: "However, if the materials hauled were immediately utilized on the improvement, the drivers were covered regardless of the source of the material." (55 Cal.App.3d at 444, quoting *Green v. Jones*, 128 N.W.2d 1, 6.)

In *Sansone,* the issue decided was whether the trucking company was a material supplier. In this case, however, the work is done by a company which also does on-site work on the Project and is clearly a subcontractor. Additionally, *Sansone* relies on federal cases construing the Davis-Bacon Act, which has language not found in the Labor Code expressly limiting its application to the construction site. Since *Sansone* held the work in question to be covered under the more restrictive federal standard, it was unnecessary for the court to address the differences in language of the federal and state statutes. For similar reasons, the Department has occasionally followed *Sansone* in finding off-site fabrication covered.[4] However, neither *Sansone* nor the Department's determinations constitute precedent for the proposition that off-site fabrication by an acknowledged subcontractor is not covered unless done in a temporary or specially set up facility. Indeed, a recent precedential determination extended coverage to off-site work in a permanent general-use facility, although the work did not entail fabrication.[5]

The question whether state prevailing wage laws must be construed in conformity with the Davis-Bacon Act, particularly with regard to language similar to Section 1772, has not been directly addressed by the California courts, but has been decided in several other states. For example, *Sharifi v. Young Brothers, Inc.* (Tex.App. 1992) 835 S.W.2d 221 ("*Sharifi*"), held the Texas prevailing wage law covered truck drivers delivering materials from a contractor's storage facility to a highway construction site. The case is particularly instructive because the relevant statute, Tex. Rev. Civ. Stat. Ann. Art. 5159a, section 1, contains language virtually identical to California Labor Code sections 1771 and 1772:

> Not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the work is performed, and not less than the general prevailing rate of per diem wages for legal holiday and overtime work, shall be paid to all laborers, workmen and mechanics . . . engaged in the construction of public works, exclusive of maintenance work. *Laborers, workmen,*

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[4] *San Diego City Schools, Construction of Portable Classrooms,* PW 99-032 (June 23, 2000).

[5] *Sacramento State Capitol Exterior Painting Project, Restoration and Hauling of Decorative Cast Iron Elements,* PW 2002-034 (July 18, 2002).

> *and mechanics employed by contractors or subcontractors in the execution of any contract or contracts for public works . . . shall be deemed to be employed upon public works.* (Emphasis added).

The court rejected the contractor's argument the state statute should be interpreted in the same manner as the Davis-Bacon Act:

> The intention of the legislature must be ascertained from the language of the statute, if possible. . . .
>
> The problem lies in the legislature's failure to define the phrase "in the execution of any contract," which is the provision limiting the statute's coverage. Because it did not define the term "execution," a word of common usage, we must give it its ordinary and common meaning. [Citation omitted.] Black's Law Dictionary defines "execution" as "the completion, fulfillment, or perfecting of anything, or carrying it into operation and effect." BLACK'S LAW DICTIONARY 510 (5th ed. 1979). Based on this definition, we conclude that the legislature intended that employees delivering materials to a Texas public-works construction site be included within the coverage of the Act. Young Brothers' construction contracts could not have been completed without materials being delivered to the work site. Sharifi's work was as directly related to and as essential to completion and fulfillment of the contracts as the work of employees using the materials at the job site. Young Brothers asserts, however, that article 5159a should be construed in the same manner as the federal Davis-Bacon Act, which requires contractors to pay prevailing wage rates to employees "employed directly upon the site of the work." See 40 U.S.C. section 276a(a) (West 1986). . . .
>
> When a federal statute is adopted in a statute of this state, a presumption arises that the legislature knew and intended to adopt the construction placed on the federal statute by federal courts. [Citation omitted.] This rule of construction is applicable, however, only if the state and federal acts are substantially similar

> and the state statute does not reflect a contrary legislative intent. [Citations omitted.]
>
> After comparing the two statutes, we conclude that their coverage provisions are not substantially similar and that the legislature clearly intended to broaden the coverage of article 5159a when it selected the phrase "in the execution of any contract" rather than the phrase "employed directly upon the site of the work" found in the federal Act. The federal Act is by its plain language more restrictive in its coverage than the Texas Act. Under the circumstances, we must determine and follow the intent of the legislature when it adopted a statute with obviously broader coverage. (*Sharifi, supra,* 835 S.W.2d at 222-223.)

In *Everett Concrete Products, Inc. v. Department of Labor and Industries* (1988) 748 P.2d 1112, 109 Wn.2d ("*Everett Concrete*"), the Washington Supreme Court used a similar analysis in holding its state's prevailing wage law applied to off-site fabrication of products "specially made" for a particular public works project. The project in question was the construction of a tunnel for an interstate highway in Seattle. Because the earth at the tunnel site was loose and could not be excavated by traditional methods, the prime contractor designed and utilized concrete tunnel liners to provide a supportive ring in the tunnel during excavation. The prime contractor contracted Everett Concrete Products ("ECP") to manufacture the tunnel liners. ECP agreed to manufacture 30,000 lineal feet of liners in accordance with measurements specified by the prime contractor and the Department of Transportation. ECP manufactured the liners on special forms built to meet the size and measurement requirements of the tunnel. The liners were manufactured at ECP's plant in Everett, and were delivered to the project site by trucking companies contracted by the prime contractor. (*Everett Concrete, supra,* 748 P.2d at 1112-1113.)

Upon inquiry by a labor organization, the Department of Labor and Industries determined that the prevailing wage law applied to the work done by ECP. ECP challenged the determination, which was upheld by an administrative law judge. ECP appealed directly to the State Supreme Court. The court engaged in *de novo* review, while according substantial weight to the agency interpretation. (*Id.* at 1113.)

The relevant statute, RCW 39.12.020, provided in part: "The hourly wages to be paid to laborers, workmen or mechanics, *upon all public works* . . . shall be not less than the prevailing rate of wage . . . .." (Emphasis supplied.) The court began its analysis by recognizing that the prevailing wage law was remedial and should be construed liberally to carry into effect the purpose of the statute. The court found the purpose, as with the Davis-Bacon Act, was "to provide protection to local craftsmen who were losing work because contractors engaged in the practice of recruiting labor from distant cheap labor areas." (*Everett Concrete, supra*, 748 P.2d. at 1114, *quoting Southeastern Washington Building & Construction Trades Council v. Dept. of Labor & Industry* (1978) 586 P.2d 486, 91 Wash.2d 411, 415.) The court held: "This purpose will be served by extending the application of RCW 39.12 to off-site manufacturers involved in public works by preventing contractors from parceling out portions of the work to various off-site manufacturers as a means of avoiding the prevailing wage requirement." (*Ibid.*)

The court also recognized the cannon of construction that "when the legislature of a state adopts a statute which is identical or similar to one in effect in another state or country, the courts of the adopting state usually adopt the construction placed on the statute in the jurisdiction in which it originated." (*Ibid., quoting* 2A N. Singer, *Statutory Construction* 52.02 (4th ed. 1984).) While noting that Washington's prevailing wage law is based on the Davis-Bacon Act, the court also noted that the state law was not identical to Davis-Bacon in that it did not contain the phrase "mechanics and laborers employed *directly* upon the site of the work" found in 40 U.S.C. 276a." (*Everett Concrete, supra*, 748 P.2d at 1115, emphasis provided by the court.) The court therefore concluded that it "need not adopt the construction placed on a similar statute in another state if the language of the statute in the adopting state is substantially different from the language in the original statute." (*Ibid.*, citing Singer, *supra*.) "[A] provision of the federal statute cannot be engrafted onto the state statute where the Legislature saw fit not to include such provision." (*Ibid., quoting Nucleonics Alliance, Local 1-269 v. WPPSS* (1984) 677 P.2d 108, 101 Wn.2d 24, 34.) The court held the omission of the word "directly" from the state statute "leads to the conclusion that the Legislature intended the scope of the state prevailing wage law to be broader than that of the Davis-Bacon Act."

The court quoted with approval a 1967 Attorney General's opinion, which stated:

> The requirement of chapter 39.12 RCW that the "prevailing rate of wage" be paid to laborers, workmen or mechanics upon all public works of the state, or any county, municipality or political subdivision, is applicable to labor performed in an off-the-job-site prefabrication by employees of the prime contractor, subcontractor, or other persons doing or contracting to do the whole or any part of the work contemplated by the contract, provided that the prefabricated "item or member" is produced specially for the particular public works project and not merely as a standard item for sale on the general market. (*Ibid., quoting* AGO 15, at 10.)

The court concluded:

> RCW 39.12.020 provides that prevailing wages must be paid to workers "upon all public works." This language must be construed to require application of the prevailing wage requirement to off site manufacturers, when they are producing nonstandard items specifically for a public works project. In this way the use of cheap labor from distant areas is avoided and the purpose of RCW 39.12 is not circumvented. (*Everett Concrete, supra,* 748 P.2d. at 1118.)

The Montana Attorney General has similarly concluded off-site fabrication is covered by that state's prevailing wage law. The Commissioner of Labor and Industry had determined "the Montana prevailing wage statute has the same geographical scope of work coverage as the Secretary of Labor's regulations defining the term 'site of the work' under the Davis-Bacon Act." (47 Opinions of the Montana Attorney General, Opinion No. 12 (March 31, 1998).) In a scholarly opinion, the Attorney General rejected that interpretation:

> The 1931 Montana statute was comparable to the Davis-Bacon Act in its original form insofar as the state law used the terms "construction, repair and maintenance" in describing the general scope of the public contracts covered and did not limit the employees covered to those performing work directly on the project site. The legislature has never adopted the "employed directly upon the site of the

work" language added to the federal act in 1935. A 1975 amendment to the Montana statute does require employers to post statements of prevailing wages "in a prominent and accessible site on the project or work area," but, as the disjunctive "or" suggests, the term "work area" may include areas other than a construction project itself. 1975 Mont. Laws ch. 531, § 1 (codified at Mont. Code Ann. § 18-2-406).

. . .

As presently codified in § 18-2-403(2), the prevailing wage requirement extends to any "public works contract" without the limiting site-specific language of the Davis-Bacon Act. Although the 1931 legislature may have intended the state statute to have the same general scope as the federal act, both laws have undergone substantial modification over the nearly 70 years since their enactments and now bear little resemblance to one another except to the extent each is directed at requiring that certain minimum wage levels be paid for work under particular classes of government contracts. . . .

I recognize that the Commissioner of Labor and Industry has concluded the prevailing wage requirement extends only to construction services performed at the job site or nearby property. The Commissioner's interpretation of a statute committed to her agency's enforcement often is entitled to substantial deference. . . . Nevertheless, here a literal reading of § 18-2-403(2) does not support a job-situs limitation, and I therefore decline to defer to the Commissioner's construction of § 18-2-403(2)(b). . . . I cannot supply a restriction unsupported by the language of the law itself. . . .

Finally, no reasonable dispute exists that a contractor's off-site fabrication of items for on-site installation constitutes "construction" within the scope of the term "construction services." Even on the most basic definitional level, such activity involves "[t]he process or art of constructing; the act of building; erection; the act of devising and forming; fabrication; composition." Webster's II:

> New Riverside Univ. Dictionary (1988) <http://www.nbc-med.org/dictionary.html>. (*Id.*)

For these reasons, the opinion concluded:

> The prevailing wage requirements in Mont. Code Ann. § 18-2-403(2)(b) apply to fabrication of materials performed off-site by a contractor for installation or use at the site of construction under a public works contract. The prevailing wage district with respect to such off-site services is the district where the on-site construction occurs. (*Id.*)[6]

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[6] There is also a federal case in accord with the above state opinions. In *Griffin v. Reich* (D.R.I. 1997) 956 F.Supp. 98 ("*Griffin*"), the court addressed the scope of coverage under the Housing Act of 1937, 42 U.S.C. sections 1437 *et seq.* 42 U.S.C. section 1437j provides that Davis-Bacon prevailing wages "shall be paid to all laborers and mechanics *employed in the development of the project.*" (Emphasis supplied.) The Housing Act thus does not expressly limit coverage to work directly on the site of the public work, as does Davis-Bacon.

In *Griffin*, Phoenix-Griffin Group II, Ltd. and the Providence Housing Authority entered into a contract for the construction of 92 units of scattered site, low-income housing. Phoenix-Griffin contracted with a subcontractor, who used an off-site facility to construct sections of the housing units being built, which were then transported to the scattered sites for installation. The Housing Authority, on the advice of HUD, took the view that the off-site work was not covered so long as it was not performed at "a temporary plant set up elsewhere to supply the needs of the project and dedicated exclusively, or nearly so, to the performance of the contract or project." (*Id.* at 101.)

Subsequently, the Wage and Hour Division of the Department of Labor determined that prevailing wages should have been paid for the off-site work and issued findings of violations, which were the subject of a hearing before an administrative law judge ("ALJ"). The ALJ upheld the Wage and Hour Division's determinations, finding that the off-site work was subject to prevailing wages, in part because the workers were "employed in the development of the project" within the meaning of the statute. The Wage Appeals Board later affirmed that part of the ALJ's decision. The matter was appealed to the federal district court, which held that:

> [B]y statute, the Department of Labor is the final arbiter of the Housing Act's interpretation with respect to Davis-Bacon coverage. See Reorg. Plan No. 12 of 1950; 42 U.S.C. 1437(j) (1994). The interpretation of the Department of Labor, which is based on the plain language of the Housing Act, does not contravene clear Congressional intent. Moreover, even if the statute were viewed as somehow unclear, such an interpretation is not "impermissible." Therefore, the interpretation set forth by the Department of Labor is the controlling one. (*Id.* at 105.)

Sharifi, *Everett Concrete* and the Montana Attorney General Opinion provide persuasive authority for the proposition that coverage of off-site fabrication under California law cannot be limited to the scope of the Davis-Bacon Act. All three adhere to the literal language of their states' prevailing wage laws in concluding that coverage is not limited to the site of the public works project. All conclude that the state law cannot be limited to the scope of Davis-Bacon when the state language is more inclusive. The Montana Attorney General went so far as to reject the interpretation of the Commissioner of Labor and Industry, even while acknowledging that her interpretation of a statute committed to her agency's enforcement was entitled to substantial deference, because he could not supply a restriction not supported by the language of the statute.

California courts have similarly recognized they must accord substantial deference to the Director of Department of Industrial Relations in interpreting the California prevailing wage law. *See International Brotherhood of Electrical Workers v. Aubry* (1996) 41 Cal.4th 1632, 1638, 49 Cal.Rptr.2d 759. However, here as in Montana, such deference does not extend to importing into the statute a restriction that is not supported by its language. The California law, like those of Texas, Washington and Montana, does not limit coverage to the site of the public works project, and it would be erroneous to construe it as doing so.[7] Here, as in Texas, under section 1772, coverage extends to workers employed by contractors or subcontractors in the execution of a contract for public work, and is not limited to the site of the public works project.

Here as in Washington, one of the purposes of the prevailing wage law is to "protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas." *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987, 4 Cal.Rptr.2d 837. Here as in Washington, that purpose is served by requiring payment of prevailing wages for off-site fabrication performed in the execution of a contract for public work.

[7] Additionally, in 2000, the Legislature amended section 1720(a) to provide that: "For purposes of this subdivision, 'construction' includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work." This amendment is further evidence of a legislative intent that the state prevailing wage law be broader in its coverage than the federal Davis-Bacon Act.

Everett Concrete articulated a reasonable test for coverage of off-site fabrication: The work is covered if the prefabricated item or member is produced specially for the public works project; it is not covered if the item fabricated is merely a standard product for sale on the general market. Such a test fits well with the language of section 1772.

Accordingly, the following test for coverage under section 1772 is adopted: Workers employed by contractors or subcontractors are employed in the execution of a contract for public work when they are engaged in the off-site fabrication of items produced specially for the public works project and not for sale on the general market. Where a contractor is producing products both for its own projects and for sale on the general market, the test for whether a prefabricated item is specially made for the public works project turns on factors such as whether the item was produced in accordance with the plans and specifications of the architects and/or engineers for that project and/or on shop drawings based thereon such that the item differs from a standard, generic item. Even standard, generic items would be considered to be produced specially for the public works project if they were modified to meet the specific requirements of that project. In this case, there is no question that some of the items prefabricated by Barto employees were produced specially for this project.

When off-site employees specially produce fabricated or prefabricated products for use in a public works project, section 1772 requires that they be paid prevailing wages.[8] This is in accord with the proposition recognized in California that prevailing wage laws are to be liberally construed in furtherance of their purposes. (*Walker v. County of Los Angeles* (1961) 55 Cal.2d 626, 634-635; *Cassaretto v. San Francisco* (1936) 18 Cal.App.2d 8, 10.)

While the project in question has long since been completed, this determination issues to clarify the test for whether off-site fabrication is covered by the prevailing wage law. Accordingly, it will not be enforced retrospectively on this or other applicable projects advertised for bid prior to the date this determination is posted on the Department's web site.

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[8] No determination was requested regarding the question of whether prevailing wages would be required where the contractor obtains specially fabricated items from another firm. However, the logic of the above analysis suggests that under those circumstances, the firm doing the fabrication would be deemed a subcontractor of Barto and its employees would be entitled to prevailing wages.

Conclusion

For the foregoing reasons, prevailing wages must be paid to the employees of contractors and subcontractors engaged in the off-site fabrication or prefabrication of items specially produced for public works projects advertised for bid after the date this determination is posted on the Department's website.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

Chuck Cake

Chuck Cake
Acting Director

EXHIBIT C

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
455 Golden Gate Avenue, Tenth Floor
San Francisco, CA 94102
(415) 703-5050

November 13, 2008

Nathan D. Schmidt, Hearing Officer
Department of Industrial Relations
Office of the Director - Legal Unit
P.O. Box 420603
San Francisco, CA 94142

Re: Public Works Case No. 2007-008
Russ Will Mechanical, Inc.
Off-Site Fabrication of HVAC Components

Dear Mr. Schmidt:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced work under California's prevailing wage laws and is made pursuant to California Code of Regulations, title 8, section 16001(a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the off-site fabrication of HVAC components by Russ Will Mechanical, Inc. ("RWM") for the DeAnza College Administration Building Modernization is subject to prevailing wage requirements.

Facts

On November 8, 2005, Trident Builders, Inc. ("Trident") entered into a public works contract with Foothill-DeAnza Community College District ("District") for the work of improvement known as the DeAnza College Administration Building Modernization ("Project") in Santa Clara County, California. This contract specifies the payment of prevailing wages as provided in Labor Code section[1] 1720, et seq. On November 21, 2005, Trident subcontracted the heating, ventilation and air conditioning ("HVAC") portion of the public works contract to RWM. The subcontract provides that "The Project is to be built according to the contract documents described in the Prime Contract and the plans, specifications and general and supplementary conditions of the Prime Contract and any addenda, revisions or modifications thereto, and addendum B (hereinafter collectively "Contract Documents") all of which are available for contractor's review."

RWM's Class 20 Warm-Air Heating and Air-Conditioning contractor's license was issued on November 28, 1990. RWM has performed off-site fabrication in its own shop since 1991. The shop, located in Hayward, California, was not established for this particular project, but rather is utilized to fabricate items for its own private and public projects. RWM does not sell its products to the general public.

[1]All further statutory references are to the California Labor Code unless otherwise indicated.

On May 22, 2006, an employee of RWM filed a complaint against RWM with the Division of Labor Standards Enforcement ("DLSE"), alleging that he was not paid prevailing wages pursuant to section 1771 and overtime pursuant to section 1810 for shop fabrication work he performed on the Project at RWM's shop. This work involved fabrication of sheet metal items called for by the Contract Documents, including ducts, flashings, square rounds and fittings. On July 13, 2007, DLSE issued and served a Civil Wage and Penalty Assessment ("Assessment") upon Trident and RWM for allegedly violating the Prevailing Wage Law in connection with the shop fabrication work. On or about March 29, 2007, RWM requested a review of the Assessment as provided in section 1742(a).

The relevant documents show that the specifications for "General Requirements Mechanical" provide for the contractor to "supply and install all supports, piping, ductwork, controls and auxiliaries, electrical and other trades work to make a complete job." The specifications designate particular equipment and supplies manufactured by third parties, requiring certain standards. In some cases, specific manufacturers are named. The section on duct work, however, appears to contemplate fabrication by the contractor.[2] It states:

> 2.02 DUCTWORK FABRICATION
>
> A. Fabricate and support in accordance with SMACNA HVAC Duct Construction Standards–Metal and Flexible, and as indicated. Provide duct material, gages, reinforcing, and sealing for operating pressure as indicated.
>
> B. Construct T's, bends, and elbows with radius of not less than 1-1/2 times width of duct on centerline. Where not possible and where rectangular elbows must be used, provide air foil turning vanes ... .
>
> C. Increase duct sizes gradually, not exceeding 15 degrees divergence whenever possible; maximum 30 degrees divergence upstream of equipment and 45 degrees convergence downstream.
>
> D. Provide standard 45 degree lateral wye takeoffs unless otherwise indicated where 90 degree conical tee connections may be used.

In contrast, in the next paragraphs of the specifications describing other work, specific manufacturers are named.

Most of the items described in the specifications can be purchased from retail material suppliers, although in this case materials were supplied by businesses that sell only to HVAC contractors, not to the general public. These items include duct work, diffusers, slot diffusers, filters, safety grates, dampers, ceiling panels, etc. One material supplier, ECO Duct Products, Inc., states that

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[2]Additionally, RWM submitted at least one change order increasing the cost of the Project by nearly $3,000. Most of the additional cost is for labor, broken down as $720 for "Fabrication labor" and $1,210 for "Field labor." This fact is further evidence that the contract contemplated that RWM would be doing a portion of the fabrication work itself.

"All duct is available in any length requested. STANDARD LENGTHS ARE 4', 5' AND 6'." This would mean that any other length would be a "special order item."

RWM had contemplated ordering 18 inch high plenums[3] from Norman S. Wright Mechanical Equipment Corporation, which in turn was going to order them from a manufacturer, Titus Flowbars. A fax from Norman S. Wright to RWM stated, however, that: "I have contacted a vendor who is willing to fabricate the 18" high plenum for Titus Flowbar. The problem is cost. Due to the special height you need, 18", the pricing is really high." RWM ended up fabricating the plenums in its own shop.

Positions of the Parties

Division of Labor Standards Enforcement

DLSE cites *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 985 and other cases stating that: "The overall purpose of the prevailing wage law is to protect and benefit employees on public works projects." It further notes that prevailing wage laws are to be liberally construed. Section 1774 requires subcontractors to "pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract." DLSE contends that the word "execution" has a plain meaning which does not require interpretation: "The words 'execute,' 'executed' and 'execution' when used in their proper sense, convey the meaning of carrying out some act or course of conduct to its completion." *Northwest Steel Rolling Mills, Inc. v. Commissioner of Internal Revenue* (9th Cir. 1940) 110 F.2d 286, 289-290, quoting 23 Corpus Juris 278. DLSE argues that when work is done in the execution of a public works contract, the requirement to pay prevailing wages is not dependent on the situs of the work. In support of this argument, DLSE quotes *Theisen v. County of Los Angeles* (1960) 54 Cal.2d 170, 183, which states that "the essential feature which constitutes one a subcontractor rather than a materialman is that in the course of performance of the prime contract he constructs a definite, substantial part of the work of improvement in accord with the plans and specifications of such contract, not that he enters upon the job site and does the construction there ... ." DLSE also cites *Everett Concrete Products, Inc. v. Dept. of Labor and Industries* (Wash. 1988) 748 P.2d 1112, which held that the Washington prevailing wage law extends "to off-site manufacturers when they are producing nonstandard items specifically for a public works project."

DLSE additionally argues that failure to cover off-site work would result in an unconstitutional denial of equal protection of the law because it would favor non-union contractors over union contractors.[4] It also asserts that under the doctrine of *expressio unius est exclusio alterius*, there

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[3]A plenum is "An enclosure in which air or other gas is at a pressure greater than that outside the enclosure." *The American Heritage Dictionary of the English Language* (New College Ed. 1979) at p. 1007. In the context of HVAC systems, a plenum is a piece of sheet metal that connects the blower to the ductwork.

[4]DLSE provides neither a factual basis nor a legal argument for this assertion, and it must be rejected as unfounded.

are no exceptions to the requirement to pay prevailing wages, and the requirement therefore applies irrespective of where the work is performed.[5]

Russ Will Mechanical, Inc.

RWM asserts that the off-site work is not covered under the reasoning of prior coverage determinations based on the analysis in *O.G. Sansone v. Dept. of Transportation* (1976) 55 Cal.App.3d 434. For example, in PW 92-036, *Imperial Prison II South* (April 5, 1994), the off-site fabrication of pre-cast concrete panels was covered because it was done at a site "whose sole purpose is the fabrication of those materials for a public works site ... ." In PW 1999-032, *San Diego City Schools/Construction of Portable Classrooms* (June 23, 2000), the work was covered for the same reason. RWM notes that in contrast to these cases, its shop was not established solely for this Project, but has been operating since 1991. Products fabricated for the Project at that shop could have been produced by a third party, including one outside of California or even the United States. In PW 2004-023, *Richmond-San Rafael Bridge/Benicia-Martinez Bridge/San Francisco-Oakland Bay Bridge* and PW 2003-046, *West Mission Bay Drive Bridge Retrofit Project, City of San Diego* (July 31, 2006) ("*Towboats*") the Director determined that whether prevailing wages are required depends on the nature of the work performed, rather than on the status of the worker as an employee of a subcontractor or material supplier.

RWM also cites PW 2005-037, *Jurupa Unified School District-Glen Avon High School* (January 12, 2007), in which prevailing wages were not required for the testing of materials done off-site in a structural steel supplier's shop based in part on the fact that the testing employees had no interaction with the construction workers. RWM asserts that the same reasoning is applicable here in that its employee was working in a long-established, permanent shop in Hayward, had no interaction with the construction workers on the job site in Santa Clara County, and his work was not an integrated aspect of the flow process of construction. Therefore, according to RWM, he was not employed in the execution of a contract for public work within the meaning of sections 1771, 1772 and 1774.[6]

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[5]Sheet Metal Workers' International Association, Local Union No. 104 ("Union") submitted a lengthy position statement in support of DLSE's position, asserting that prevailing wages are required "for the fabrication of sheet metal items made for a particular public works project in accordance with plans and specifications contained in the public works contract documents for the project, even if the fabrication is performed at an off-site location that was not established solely for the project." (Union brief of June 19, 2007, at p. 2.) Union asserts that whether the Prevailing Wage Law applies to employees who perform off-site fabrication work depends on a case-by-case analysis, citing PW 92-036, *Imperial Prison II South* (April 5, 1994) and PW 1999-032, *San Diego City Schools/Construction of Portable Classrooms* (June 23, 2000). It contends that the critical factor in such analysis is whether the off-site fabrication is "an integral part of the prime contract," citing PW 99-037, *Alameda Corridor Ready Mix Concrete* (April 10, 2000). "The integral nature of the work in furtherance of completing the project is the single most important factor ... ." (Union brief of June 19, 2007, at p. 10, quoting *Imperial Prison II, supra.*)

[6]Several contractor associations submitted position statements in support of RWM's position. These associations include Associated Builders and Contractors of California, Inc. ("ABC"), Associated General Contractors of California, Inc. ("AGC"), Construction Employers Association ("CEA"), Air Conditioning Trade Association ("ACTA"), Engineering & Utility Contractors Association ("EUCA") and Precast/Prestressed Concrete

Discussion

Section 1720(a)(1) defines "public works" as "[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds ... ." Section 1771 provides:

> Except for public works projects of one thousand dollars ($1,000) or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works.
>
> This section is applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces. This section is applicable to contracts let for maintenance work.

Section 1772 provides that: "Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work." Section 1774 provides that: "The contractor to whom the contract is awarded, and any subcontractor under him, shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract."

The statutory term "execution" recently was interpreted by the First District Court of Appeal in *Williams v. SnSands Corporation* (2007) 156 Cal.App.4th 742, 749-750:

> In determining legislative intent, courts are required to give effect to statutes according to the usual, ordinary import of the language employed in framing them. [Citations and quotation marks omitted.] The familiar meaning of "execution" is "the action of carrying into effect (a plan, design, purpose, command, decree, task, etc.); accomplishment" (5 Oxford English Dict. (2d ed. 1989) p. 521); "the act of carrying out or putting into effect," (Black's Law Dict. (8th ed. 2004) p. 405, col. 1); "the act of carrying out fully or putting completely into effect, doing what is provided or required." (Webster's 10th New Collegiate Dict. (2001) p. 405.) Therefore, the use of "execution" in the phrase "in the execution of any contract for public work," plainly means the carrying out and completion of all provisions of the contract.

Manufacturers Association of California ("PCMAC"). AGC, for example, asserts that workers "employed on public works" within the meaning of sections 1771 and 1772 are those performing actual construction work as defined by section 1720(a)(1), and not ancillary work performed away from the job site for which a contractor's license is not required. (AGC letter of June 1, 2007, at p. 3.)

> The analysis in *O.G. Sansone Co. v. Department of Transportation* [1976] 55 Cal.App.3d 434, 127 Cal.Rptr. 799 (*"Sansone"*) of who is, and who is not, a subcontractor obligated to comply with the state's prevailing wage law also informs our assessment of the intended reach of the prevailing wage law to "[w]orkers employed ... in the execution of any contract for public work." (§ 1772.)

Williams and *Sansone* recognized an exemption for material suppliers, basing their analyses in part on *H. B. Zachry Company v. United States* (1965) 344 F.2d 352, a federal case that applied to truck drivers a long-standing interpretation of the Davis-Bacon Act generally exempting material suppliers from coverage. In *Zachry*, the court explained that:

> Beginning as early as 1942 [fn. omitted], the Solicitor [of the Department of Labor] has excluded from statutory coverage the employees of bona fide materialmen who sell to a contractor engaged in construction contracts covered by the Davis-Bacon Act. The exemption has been qualified to the extent that the materialmen must be selling supplies to the general public, the plant must not be established specially for the particular contract, and the plant is not located at the site of the work. [Fn. omitted.] The Solicitor has always held that truck drivers employed by materialmen (exempt from statutory coverage) to transport supplies to the jobsite are no more subject to the provisions of the Davis-Bacon Act and the Eight-Hour Laws than are other employees of the materialmen. [Fn. omitted.]

Id. at p. 359, quoted in *Sansone, supra,* 55 Cal.App.3d at p. 442.

By its terms, section 1772 requires prevailing wages only for "[w]orkers *employed by contractors or subcontractors* in the execution of any contract for public work ... ." (Emphasis supplied.) Thus, here as in *Sansone* and *Williams*, it is appropriate to follow *Zachry*.

The issue of whether prevailing wages are required for the fabrication work done by RWM therefore turns on the question of whether RWM is exempt from coverage as a material supplier. Although RWM's shop was not established specially for this Project, and is not located at the site of the Project, it does not sell supplies to the general public. Thus, RWM is not a material supplier exempt from prevailing wage obligations under the *Zachry-Sansone-Williams* analysis. To the contrary, RWM is indisputably a subcontractor. Trident and RWM entered into a "Subcontract Agreement," subtitled "Contract Between General Contractor and Subcontractor." That agreement recites that Trident and District had entered into a contract for the construction of the Project, and that Trident wished to subcontract certain work to RWM. Paragraph 1 of the agreement provides that: "Subcontractor agrees to furnish in accordance with that portion of the Contract Documents ... applicable to the 'Work,' all labor, materials, supplies, equipment, services, machinery, tools, and other facilities of every kind and description, including proper supervision at all times, required for the prompt and efficient execution of the work as described in Addendum A, attached hereto ... ." Addendum "A" in turn describes the scope of work as follows: "Subcontractor shall furnish all labor, materials, equipment, services and supplies

necessary to complete, in full accordance with the Contract Documents, the HEATING, VENTILATING, AND AIR CONDITIONING work, generally as outlined in Sections 15010 thru 15086, 15182, 15720 thru 15850, and 15950 of the Project Specifications." It is clear from these facts that RWM is a subcontractor within the meaning of section 1772.[7]

Under section 1772, prevailing wages are due to all RWM workers employed in the execution of the public works contract. Therefore, prevailing wages are due employees for work at the RWM shop that carried out or completed the terms of the construction contract RWM entered into with Trident.

I hope this letter satisfactorily answers your inquiry.

Sincerely,

John C. Duncan
Director

[7]Given that RWM contracted to perform a substantial part of the construction at the Project site, it is unnecessary to reach the conclusion urged by DLSE, citing *Theisen v. County of Los Angeles, supra,* 54 Cal.2d 170, that the status of subcontractor does not require entering upon and doing work at the job site. It should be noted in this regard that the *Sansone* court declined to follow *Theisen,* finding that *H. B. Zachry Company v. United States, supra,* 344 F.2d 352 afforded more guidance with respect to the resolution of the question of whether one is a subcontractor or material supplier. *Sansone, supra,* 55 Cal.App.3d at p. 442.

RWM's reliance on certain past coverage decisions is similarly misplaced. While this matter was pending, the Department decided it would no longer designate public works coverage determinations as "precedential" under Government Code section 11420.60. Consequently, the determinations relied upon by RWM no longer have precedential effect. Public notice of the Department's decision to discontinue the use of precedent decisions can be found at www.dir.ca.gov/DLSF/09-06-2007(pwcd).pdf. Notwithstanding the discontinuation of precedent decisions, PW 2005-037, *Jurupa Unified School District-Glen Avon High School, supra,* is factually distinguishable. In that case, the work in question was not only performed off-site, but was performed in a fabrication shop operated by a bona fide material supplier, not a subcontractor. In PW 2004-023/2003-046, *Towboats, supra,* the decision was issued prior to, and without benefit of, *Williams v. SnSands, supra,* 156 Cal.App.4th 742. Contrary to *Towboats,* the court in *Williams* stressed the importance of distinguishing between subcontractors and material suppliers under the statutory scheme. Both PW 92-036, *Imperial Prison II South, supra,* and PW 1999-032, *San Diego City Schools/Construction of Portable Classrooms, supra,* entailed off-site work done in dedicated facilities. In both cases, the work was covered because the material supplier exemption did not apply. The results in both cases are consistent with the result here.

EXHIBIT D

STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL
RE: PUBLIC WORKS CASE NO. PW 2007-008
RUSS WILL MECHANICAL, INC.
OFF-SITE FABRICATION OF HVAC COMPONENTS

I. INTRODUCTION

On November 13, 2008, the Director of the Department of Industrial Relations (the "Department") issued a public works coverage determination (the "Determination") in the above referenced matter finding that, under the facts of the case, certain off-site fabrication work performed in the permanent shop of the on-site heating, ventilating and air conditioning ("HVAC") subcontractor was done in the execution of a contract for public work within the meaning of Labor Code section 1772,[1] and was therefore subject to prevailing wage requirements.

On December 18, 2008, the subcontractor, Russ Will Mechanical, Inc. ("RWM"), timely filed a notice of administrative appeal of the Determination (the "Notice of Appeal"). RWM also requested a hearing on the appeal. At the Department's invitation, on February 13, 2009, RWM filed a supplemental brief stating in further detail the grounds for its appeal. On or before April 17, 2009, responsive papers were submitted by the Division of Labor Standards Enforcement ("DLSE"), and other interested parties as follows: Associated General Contractors of California ("AGC"), Construction Employers Association ("CEA"), Associated Builders and Contractors of California ("ABC"), Precast/Prestressed Concrete Manufacturers Association of California ("PCMAC"), and Association of Engineering Construction Employers, Inc. ("AECE") submitted argument in support of the appeal. Local Union No. 104 of the Sheet Metal Workers' International Association ("Union") submitted argument in opposition to the appeal.

With regard to the request for hearing, California Code of Regulations, title 8, section 16002.5(b) provides that the decision to hold a hearing regarding a coverage appeal is within the

[1]All subsequent section references are to the Labor Code unless otherwise indicated.

Director's sole discretion. Here, the facts set forth in the Determination material to the coverage question are not in dispute. Because the issues raised in the appeal are solely legal, no hearing is necessary. It should, however, be noted that the coverage issue arises in the context of the adjudication of a request for review under section 1742. RWM is entitled to a hearing on its request for review, and it is the responsibility of the hearing officer to define the issues to be heard. Cal. Code Regs., tit. 8, § 17243(d).

All of the submissions have been considered carefully. For the reasons set forth in the Determination, which is incorporated into this Decision, and for the additional reasons stated below, the appeal is granted and the Determination is reversed.

II. POSITIONS OF THE PARTIES

A. Arguments In Support Of The Appeal

The arguments of RWM and the interested parties in support of the appeal may be summarized as follows:

1. The Determination is contrary to *O.G. Sansone Co. v. Dept. of Transportation* (1976) 55 Cal.App.3d 434 and other applicable case law;
2. The Determination is contrary to longstanding Department interpretation of the California Prevailing Wage Law (the "CPWL") limiting coverage to on-site construction work;
3. Principles of statutory construction support limiting coverage to on-site work and making the interpretation of the CPWL consistent with the federal prevailing wage law, the Davis-Bacon Act (40 U.S.C.A. § 3142) (the "DBA");
4. The CPWL covers only work required to be performed under a state contractor's license;
5. The Determination is an invalid underground regulation because it was not adopted in conformity with the California Administrative Procedure Act (Govt. Code, § 11340 et seq.) (the "APA");
6. The Determination constitutes a violation of due process by imposing a new enforcement policy retroactively;
7. Article I, section 8, clause 3 of the United States Constitution (the "Commerce Clause") precludes application of the CPWL to out-of-state work; and

8. The Determination is contrary to desirable public policy objectives, and will produce impractical results.

B. Arguments In Opposition To The Appeal[2]

The arguments of DLSE and Union may be summarized as follows:

1. The Determination is consistent with applicable case law;
2. Past determinations by the Department have concluded that certain off-site work is within the CPWL's ambit;
3. Because the language of the CPWL differs from that of the DBA, coverage under the former is broader than coverage under the latter;
4. Coverage under the CPWL should not be determined by reference to the contractor licensing law because the two statutory schemes have different purposes;
5. The Determination is not an invalid underground regulation because coverage determinations are authorized by the CPWL;
6. RWM has cited no authority for its due process argument, and a similar argument was rejected in *Lusardi Construction Company v. Aubry* (1992) 1 Cal.4th 976;
7. Because section 1773.2 mandates inclusion of prevailing wage requirements in public works contracts, the Commerce Clause does not preclude enforcement of those requirements with regard to work done outside the state "in the execution of" those contracts; and
8. The Determination will not produce impractical results.

III. DISCUSSION

A. The Determination Correctly Found That RWM Was A Subcontractor Within The Meaning Of The Labor Code, And Did Not Meet The Criteria For The Material Supplier Exemption.

Because the case law recognizes an exemption from prevailing wage requirements for bona fide material suppliers, RWM and other parties supporting its appeal contend that RWM performed the off-site fabrication in the capacity of a material supplier. It is therefore necessary to examine RWM's status in light of that case law.

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[2]The arguments enumerated here have been carefully considered. For reasons of brevity and continuity, some sections of this Decision on Administrative Appeal respond to multiple arguments.

The Determination focused on the facts regarding RWM's role in the DeAnza College Administration Building Modernization (the "Project") and carefully analyzed the relevant contract documents. Because RWM entered into a written subcontract with prime contractor Trident Builders, Inc., requiring, among other things, that RWM fabricate and install ductwork needed for the Project, the Determination found specifically that RWM was therefore an on-site contractor. RWM performed the off-site fabrication in question in its own off-site shop, which was not established specially for the Project. This shop did not produce products for sale to the general public. The Determination concluded that under these specific facts, RWM was a subcontractor performing the off-site fabrication work in the execution of a contract for public work within the meaning of section 1772, and that RWM did not meet the criteria for the material supplier exemption recognized in applicable case law.

The central issue in this appeal is whether the Determination correctly interpreted the CPWL in light of existing case law, especially *Williams v. SnSands Corporation* (2007) 156 Cal.App.4th 742, and *O.G. Sansone Co. v. Department of Transportation, supra,* 55 Cal.App.3d 434. In arguing against the Determination, RWM maintains that it performed the off-site fabrication as a material supplier, rather than as a subcontractor.[3] The *Williams* court addressed this distinction, albeit in the context of off-hauling:

> "Contractor" and "subcontractor," for purposes of the prevailing wage law, include "a contractor, subcontractor, licensee, officer, agent, or representative thereof, acting in that capacity, when working on public works ...." (§ 1722.1.) Workers "employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work." (§ 1772.)
>
> Here, we must interpret and apply these statutory provisions to resolve whether workers performing S&S Trucking's agreements to *off*-haul material from a public works site were employed "in the execution" (§ 1772.) of the public works contract.
>
> ...

[3]RWM argues that the terms "contractors" and "subcontractors" in section 1772, "must be defined in accordance with the requirements of the state contractor's license board." Union argues persuasively why those requirements, found in the Business and Professions Code, are not germane to this case. It is unnecessary to resort to the Business and Professions Code, because section 1722.1 defines "contractor" and "subcontractor" more broadly to "include a contractor, subcontractor, licensee, officer, agent, or representative thereof, acting in that capacity, *when working on public works* pursuant to this article and Article 2 (commencing with Section 1770)." (Emphasis supplied.) Moreover, it is undisputed that RWM *is* a licensed contractor, and functioned as an on-site subcontractor on this Project. For these reasons and the additional ones stated by Union, RWM's licensing argument is without merit.

> The analysis in [*Sansone*] of who is, and who is not, a subcontractor obligated to comply with the state's prevailing wage law also informs our assessment of the intended reach of the prevailing wage law to "[w]orkers employed ... in the execution of any contract for public work." (§ 1772.)

Williams, supra, 156 Cal.App.4th at pp. 749-750 (emphasis in original).

Those parties supporting the appeal tend to minimize the significance of *Williams*. AGC argues that *Williams* should be accorded no weight because it was decided without the Department's participation, concerns trucking, and (in AGC's view) applies a flawed analysis. None of these points justifies the Department ignoring a published decision of the Court of Appeal. Unless overruled by the California Supreme Court, the case is binding precedent in identical fact situations.

While the CPWL lacks any express exclusion for material suppliers, the courts have interpreted the statutory use of the terms "contractor" and "subcontractor" to exclude bona fide material suppliers when the work performed is "truly independent of the performance of the general contract for public work," and was not "integral to the performance of that general contract." *Williams, supra,* 156 Cal.App.4th at p. 752. In applying the criteria for the exemption articulated in *H.B. Zachry Co. v. United States* (Ct.Cl. 1965) 344 F.2d. 352, and adopted in *Sansone*, the *Williams* court explained: "To qualify for the exemption, the material suppliers had to be selling supplies to the general public, his plant could not be established specially for the particular public works contract, and his plant could not be located at the project site." *Williams, supra*, 156 Cal.App.4th at pp. 750-751.

CEA argues that RWM functioned in a dual capacity, serving as both a subcontractor performing on-site construction, and a material supplier fabricating products in its off-site shop. CEA finds support for this argument in a passage from *Zachry, supra,* 344 F.2d at p. 360:

> [T]he Solicitor has introduced a functional distinction between "materialmen" and "subcontractors", or has separated work involved in the materialman's function from work done under the contract. In two opinions, he has held that where a contractor covered by the statute is also an established materialman selling to the general public, the employees of his supply operation, including those who are engaged in the delivery of materials to the federal construction project, are not subject to the Davis-Bacon Act.[4]

[4]The Solicitor opinions discussed by the *Zachry* court are Op. Sol. Lab. to Alex M. Barman, Jr., October 6, 1960; Op. Sol. Lab. to Charles A. Horsky, November 27, 1957; see also Op. Sol. Lab. No. DB-36, June 24, 1963.

CEA argues that, with respect to the off-site fabrication, RWM was a material supplier selling to the general public, drawing an analogy to PW 2009-035, *Sunset Garden Apartments, Imperial County Housing Authority* (May 28, 2008). The analogy, however, is imprecise. In *Sunset Garden*, as CEA notes, a company engaged in the off-site prefabrication of roof trusses and other products for sale to contractors and builders was determined to be a material supplier. The firm in question performed no on-site work and did, in fact, sell its products to the on-site contractor (which happened to be a related company) as well as to other customers in the construction industry. Here, in contrast, RWM performed on-site work, did not sell its products to an on-site contractor, and, does not sell products to the "general public."

Sunset Garden did not address the question presented in this case: whether RWM's use of such a permanent off-site facility for its fabrication work qualifies it for the material supplier exemption irrespective of its lack of sales to the general public. There is no California case law suggesting that an entity may be a bona fide material supplier in the absence of sales to the general public, and the Director will not speculate whether sales to the general public is an optional criterion for qualifying as a material supplier. Accordingly, it is unnecessary to determine whether, as CEA, argues there are circumstances in which an entity may function in a dual capacity as subcontractor and material supplier for the same project.

For the reasons discussed above, the Determination was correct in characterizing RWM as a subcontractor on the Project. As discussed below, however, it does not necessarily follow from this characterization that the off-site fabrication was subject to prevailing wage requirements.

B. While Prevailing Wages Have Been Required For Certain Off-Site Work Done At A Temporary Site Specially Established For A Public Works Project, Prevailng Wages Have Not Been Required For 0ff-Site Work Done In The Permanent Shop Of A Subcontractor.

Parties seeking reversal of the Determination contend that the Department previously has not required payment of prevailing wages for off-site work under circumstances similar to the facts of this case. It is therefore necessary to examine the Department's past determinations, although such determinations do not have precedential effect.[5]

[5]As was noted in the Determination here at issue, while this matter was pending, the Department decided it would discontinue its prior practice of designating certain public works coverage determinations as "precedential" under Government Code section 11425.60. Public notice of the Department's decision to discontinue the use of

The Department has consistently required prevailing wages to be paid in limited circumstances when the work did not qualify for the material supplier exemption under *Sansone.* In past determinations finding such work to be covered, the off-site fabrication was performed at a temporary yard established specially for the project in question, not in a subcontractor's own permanent shop.[6] Thus, in PW 92-036, *Imperial Prison II, South* (April 5, 1994), the Department determined that prevailing wage requirements applied to the off-site fabrication of concrete panels at a yard established exclusively for the public works project. Similarly, in PW 99-032, *San Diego City Schools, Construction of Portable Classrooms* (June 23, 2000), the Department determined that the off-site construction of portable classrooms was subject to prevailing wage requirements because the work was performed in a dedicated yard, and the employer was therefore a contractor and not a material supplier.

On the other hand, as early as 1984, the Department has determined that off-site work done by a bona fide material supplier is not subject to prevailing wage requirements. CEA cites the determination in *Russell Mechanical, Inc.,* dated September 17, 1984, together with the Opinion on Reconsideration in that case, dated September 11, 1985. In that case, the Department determined that the off-site fabrication of a fume recovery hood for the Rancho Seco Nuclear Power Plant, by a "standard supplier of sheetmetal products to the public at large," was not subject to prevailing wage requirements. The Opinion on Reconsideration at page 4 applied the *Sansone* analysis and found that "Russell is a standard supplier of sheetmetal products to the public at large, that Russell has long been such a vendor independent of the SMUD Rancho Seco project, and that Russell Mechanical is not located on or near the site of the SMUD project." Similarly, in PW 2005-037, *Jurupa Unified School District-Glen Avon High School* (January 12,

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precedent decisions can be found at www.dir.ca.gov/DLSF/09-06-2007(pwcd).pdf. Consequently, prior determinations are discussed herein only for purposes of addressing the arguments raised by the parties, and are not cited as precedent.

[6]In 2003, the Department did issue two determinations finding off-site fabrication by subcontractors in their permanent shops to be covered. PW 2000-027, *Cuesta College/Offsite Fabrication of Sheet Metal Work* (March 4, 2003); PW 2002-064, *Off-Site Fabrication by Helix Electric, City of San Jose/SJSU Joint Library Project* (March 4, 2003). On May 3, 2004, however, the Department issued Decisions on Appeal in both cases, stating that: "[E]ffective immediately, the determinations are withdrawn. The prior precedential public works coverage determinations and decisions on appeal concerning the issues in these determinations control. (See, *Imperial Prison II, South,* PW 92-036 (April 5, 1994) and *San Diego City Schools/Construction of Portable Classrooms,* PW 1999-032 (June 23, 2000).)"

2007), prevailing wages were not required for the testing of materials done off-site in a structural steel supplier's shop.

In *Imperial Prison II* and *San Diego City Schools,* as in *Russell Mechanical* and *Jurupa Unified School District*, the Department applied the *Sansone* test, albeit with different results. Thus, the Department has consistently applied the *Sansone* analysis in determining whether off-site work is subject to prevailing wage requirements. The outcomes have varied because of the facts of the individual cases. The problem is that neither *Sansone*, *Williams*, nor any other California case has addressed the specific issue posed by this case, i.e., whether fabrication is subject to prevailing wage requirements when done in the permanent off-site shop of a subcontractor who is not selling materials to the general public. To answer this question, it is therefore necessary to look beyond state court decisions and administrative determinations.

C. In The Absence Of Legislative Or Judicial Guidance, It Is Appropriate To Interpret The CPWL Consistently With Federal Regulations Applicable To Shop Work Performed By Subcontractors.

Parties seeking reversal of the Determination argue that the CPWL should be interpreted consistently with the federal Davis-Bacon Act. In the absence of contrary authority, there is merit in this argument.

In *Southern California Labor Management Operating Engineers Contract Compliance Committee v. Aubry* (1997) 54 Cal.App.4th 873, 882-883, the court stated: "The PWL and DBA each carry out a similar purpose. ... Read as a unit PWL and DBA set out two separate, but parallel, systems regulating wages on public contracts. The PWL covers state contracts and DBA covers federal contracts." *Accord, City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 954. The parallels between the two statutory schemes are exemplified by section 1773, which requires that: "In determining the [prevailing wage] rates, the Director of Industrial Relations shall ascertain and consider the applicable wage rates established by collective bargaining agreements *and the rates that may have been predetermined for federal public works*, within the locality and in the nearest labor market area." (Emphasis supplied.)

The language of the CPWL differs in some respects from its federal counterpart. Thus, for purposes of state prevailing wage requirements, section 1772 provides that: "Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon the public work." The DBA requires prevailing wages for "all

mechanics and laborers employed directly upon the site of the work ... ." 40 U.S.C.A. § 3142(c)(1). Union argues that the Department should follow the lead of courts in other states that have cited similar differences in statutory language as a basis for extending coverage under state prevailing wage laws to off-site work that would not be covered under the DBA.[7]

Decisions from the courts of other states, while not binding precedent, may nonetheless be instructive. The problem with Union's argument, however, is that the California courts have not interpreted the CPWL more broadly than the DBA on the basis of out-of-state authority. Instead, they have relied upon federal cases interpreting the DBA, resulting in interpretations of the CPWL that are in harmony with the DBA.[8] Moreover, the California Supreme Court looked to federal regulations defining the scope of the DBA in construing the CPWL: "Although the Legislature was free to adopt a broader definition of 'construction' for projects that state law covers, certainly the fact that federal law generally confines its prevailing wage law to situations involving actual construction activity is entitled to some weight in construing the pre-2000 version of the statute." *City of Long Beach, supra,* 34 Cal.4th at p. 954.

Accordingly, it is appropriate to consider the federal regulation defining "site of the work" as used in the DBA. Code of Federal Regulations, title 29, section 5.2 provides in part:

> (3) *Not included in the site of the work are permanent* home offices, branch plant establishments, *fabrication plants*, tool yards, etc., *of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular Federal or federally assisted contract or project.* In addition, fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial or material supplier, which are established by a supplier of materials for the project before opening of bids and not on the site of the work as stated in paragraph (l)(1) of this section, are not included in the site of the work. Such permanent, previously established facilities are not part of the site of the work, even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract. (Emphasis supplied.)

Thus, the Department of Labor has by regulation established a test for off-site work by contractors and subcontractors similar to the *Sansone-Williams* test for off-site work by material

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[7]The cases cited by Union are *State of Nevada v. Granite Constr. Co.* (Nev. 1992) 40 P.3d 423, 427; *Everett Concrete Prods., Inc. v. Dep't of Labor & Industrial Relations* (Wash. 1988) 748 P.2d 1112, 1113-1115; *Long v. Interstate Ready-Mix, L.L.C.* (Mo. App. W.D. 2002) 83 S.W.3d 571, 578.

[8]This Department has also looked to relevant federal authorities in interpreting the CPWL. See, e.g., PW 2008-022, *On-Site Heavy Equipment Upkeep and Repair for the Interstate 80 Soda Springs Improvement Project, State of California Department of Transportation* (November 13, 2008).

suppliers, in that to be exempt from coverage, the work must be done away from the public works site at a permanent facility. As neither the legislature nor the courts of California have formulated any other test to be applied to factual situations such as the one at hand, it is appropriate to look to the above federal test for guidance. This has the practical advantage of promoting harmony between the federal and state statutory schemes, and thus is in the spirit of the California cases discussed above.

The off-site fabrication at issue here was done in the permanent shop of RWM, a subcontractor, and that shop's location and continuance in operation were determined wholly without regard to a particular public works contract or project. Therefore, contrary to the conclusion reached in the Determination, the off-site fabrication was not done in the execution of the contract for public work within the meaning of section 1772.

D. Because The Determination Was Not A Standard Of General Application, It Was Not An Underground Regulation And The Rulemaking Procedures Of The Administrative Procedure Act Are Inapplicable.

RWM contends that the Determination was an invalid underground regulation as it was not adopted in conformity with the APA. Government Code section 11340.5, subdivision (a) provides that: "No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation ... , unless the ... rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter." Government Code section 11340.9, subdivision (i) provides that: "This chapter does not apply to ... A regulation that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state." Thus a principal identifying characteristic of a rule subject to the APA is that it must be intended to apply generally, rather than only in a specific case. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.

Here, the Determination lacked that fundamental identifying characteristic of a regulation subject to the APA in that it was not intended to apply generally, but rather only to a specific case. It was directed to a specifically named legal person, RWM, and thus was exempted from APA rulemaking requirements by Government Code section 11340.9, subdivision (i).

Moreover, the authority of the Director to make coverage determinations was upheld in *Lusardi, supra,* 1 Cal.4th at p. 989. In the numerous court challenges to coverage determinations since, no court has ever found that authority lacking, or suggested that it is subject to the APA.

For these reasons, the Determination was not subject to the APA rulemaking requirements and was not an underground regulation.

E. The Determination Did Not Enforce A New Rule Retroactively So As To Deny RWM A Property Interest Without Due Process Of Law.

Article 1, section 7 of the California Constitution provides that: "A person may not be deprived of life, liberty, or property without due process of law ... ." In its Notice of Appeal RWM asserts, without authority, that: "The coverage determination constitutes a violation of due process by imposing a new DIR coverage policy retroactively ... ." RWM did not expand on this argument when given a chance to do so.

The California Supreme Court rejected a similar argument when it held that a prevailing wage coverage determination is not "an 'adjudication' resulting in a deprivation requiring procedural due process." *Lusardi, supra,* 1 Cal.4th at p. 990. The Court of Appeal rejected a similar argument in *Sansone, supra,* 55 Cal.App.3d at p. 455: "An involuntary burden was not placed upon plaintiffs by virtue of the legislation reviewed herein. Plaintiffs' execution of the contract with knowledge of the penalties to be imposed if they or their subcontractors failed to pay the prevailing wages required under the contract was voluntary, and constituted consent to the provisions now challenged." The holding in *Lusardi* requires rejection of RWM's due process argument, which, in any case, is rendered moot by this Decision.

F. The Determination Does Not Infringe Upon The Commerce Clause.

The Commerce Clause provides that: "Congress shall have Power ... [t]o regulate Commerce ... among the several States." CEA asserts that attempts to apply the CPWL to out-of-state workers would pose potential violations of the Commerce Clause, citing the plurality opinion in *Edgar v. MITE Corp.* (1982) 457 U.S. 624, 642-643 ["The Commerce Clause ... precludes the application of a state statute to commerce that takes place wholly outside the state's borders, whether or not the commerce has effects within the state."].

Edgar has no bearing on the facts of this case, which involve only activities wholly within California, and indisputably subject to California labor standards. Rather, CEA's argument entails hypothetical efforts to impose California prevailing wages on out-of-state

employers. Given that the Determination in question was limited to the specific facts this case, speculation regarding hypothetical attempts to apply the CPWL extraterritorially is beyond the scope of this appeal. For these reasons, CEA's Commerce Clause argument would be without merit even if it were not moot.

G. Social And Economic Policy Decisions Are The Province Of The Legislature, Not The Department.

Several interested parties argue that implementation of the Determination would lead to a host of impractical or undesirable consequences. Typical of such arguments are the assertions by PCMAC that requiring prevailing wages for off-site fabrication would impair the emerging "green or sustainable building movement," which favors the use of pre-fabricated components. PCMAC further contends that the Determination, if affirmed, would "even threaten the very viability of industries like ours while favoring out-of-State and out-of-Country manufacturers who are not subject to California prevailing wage rules and enforcement."

These arguments are erroneous for at least two reasons. First, they incorrectly assume that the Determination announced a rule of general application requiring prevailing wages for off-site fabrication in all cases, when in reality it was limited to the specific facts of this case. Second, the role of the Department is limited to interpreting and enforcing the Labor Code as enacted by the legislature. It would be an improper usurpation of the legislative function for the Department to impose its own social and economic policy judgments under the guise of statutory interpretation. See, *State Building Trades, supra*, 162 Cal.App.4th at p. 324 ["These are issues of high public policy. To choose between them, or to strike a balance between them, is the essential function of the Legislature, not a court."].

IV. CONCLUSION

For the reasons set forth in the Determination and in this Decision on Administrative Appeal, the appeal is granted and the Determination is reversed. This Decision constitutes the final administrative action in this matter.

Dated: 5/3/10

John C. Duncan, Director

EXHIBIT E

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
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Arnold Schwarzenegger, *Governor*

June 26, 2007

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Re: Public Works Case No. 2005-025
Canyon Lake Dredging Project
Lake Elsinore and San Jacinto Watersheds Authority

Dear Mr. Carroll:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws and is made pursuant to California Code of Regulations, title 8, section 16001(a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the Canyon Lake Dredging Project ("Project") is a public work subject to prevailing wage requirements with the exception of the off-hauling of the dredged material. The off-hauling is not a public work and, therefore, is not subject to prevailing wage requirements.

Facts

Canyon Lake is a water storage reservoir, owned by the Elsinore Valley Municipal Water District ("EVMWD") and located between the Cities of Perris to the north and Lake Elsinore to the south. The reservoir is virtually surrounded by a privately owned residential development, which has incorporated itself as the City of Canyon Lake ("City"). The residential property owners form the membership of the Canyon Lake Property Owners Association ("POA").

In 1968, Temescal Properties, Incorporated (POA's predecessor-in-interest) entered into a 55-year lease with the Temescal Water Company (EVMWD's predecessor-in-interest). That lease let the exclusive right to use the reservoir only for boating, fishing and water sports, while prohibiting the lessee from making any use of it that would interfere with the its operation as a storage reservoir for agricultural and domestic water. The lease also grants the lessee the right to dredge the reservoir, subject to certain conditions.

In 2000, the voters of California passed Proposition 13, the Safe Drinking Water, Clean Water, Watershed Protection and Flood Protection Bond Act, authorizing funding of $1.97 billion for projects within its purview. Of the authorized funds, $15 million was allocated to the Lake Elsinore and San Jacinto Watersheds Program. Wat. Code, § 74104.100 et seq. Water Code section 79104.110 provides that the funds appropriated pursuant to these provisions were to be "allocated to a joint powers agency ... for the implementation of programs to improve the water quality and habitat of Lake Elsinore, and its back basin consistent with the Lake Elsinore Management Plan."

In 2000, pursuant to the above statute, a Joint Powers Agreement created the Lake Elsinore and San Jacinto Watersheds Authority ("LESJWA"). This agreement was entered into by City, EVMWD, the City of Lake Elsinore, the County of Riverside, the Riverside County Flood Control and Water Conservation District and the Santa Ana Watershed Project Authority.

On May 31, 2003, the California Department of General Services approved a contract between the California State Water Resources Control Board ("Board") and LESJWA. The contract makes LESJWA the "contractor" to provide the Board subvention service to rehabilitate and improve the Lake Elsinore Watershed and the San Jacinto Watershed and the water quality of Lake Elsinore. Pursuant to that contract, the Board issued Task Orders No. 8 and No. 8.1, providing for LESJWA to remove 100,000 cubic yards of sediment that had accumulated in the East Bay of Canyon Lake from San Jacinto Watershed storm runoff. Both Task Orders describe the "Scope of Work" as follows:

> Canyon Lake Dredging Project
>
> Approximately 100,000 cubic yards of the 225,000 total cubic yards of sediment will be removed during the June 17, 2004, through March 31, 2006 performance period. The sediments will be pumped out of the lake by a self-propelled floating dredge to a dewatering site. ... The dewatered sediment will be hauled to the Audie Murphy Ranch development property for disposal. Other land development sites may be used for disposal of dewatered sediment. The project will conform with applicable rules, regulations, and permitting requirements of local, state and federal agencies.

Effective July 15, 2004, LESJWA, City and POA entered into an agreement providing that POA would do the work LESJWA contracted with the Board to do. That agreement recites that:

> C. Canyon Lake is tributary to Lake Elsinore. Canyon Lake is owned and operated by the Elsinore Valley Municipal Water District ("EVMWD") a Member Agency of LESJWA. EVMWD leases Canyon Lake to the Canyon Lake Property Owners Association for recreation purposes.
>
> D. LESJWA has been awarded a $15 million grant from the Safe Drinking Water, Clean Water, Watershed Protection and Flood Protection Bond Act of 2000 (the "Bond Act"). Pursuant to the Bond Act, LESJWA and the California State Water Resources Control Board entered into a contract designating LESJWA as the program manager for funds expended thereunder.
>
> E. After study, the Board of Directors of LESJWA found and determined that the water quality in Lake Elsinore would be improved if the bottom of Canyon Lake was dredged of silt that has accumulated as the result of stormwater inflows to the Lake.

Paragraph 3 of the agreement provides that: "The ASSOCIATION shall perform the services required hereunder in the ASSOCIATION's own way as an independent contractor, and not as an employee of LESJWA."

POA estimates the total cost of the Project to be $26,755,559. LESJWA agreed to contribute approximately $1.2 million to the Project.

Before beginning the work, POA obtained a required permit from the Department of the Army. POA applied for the permit on February 23, 2004. Attached to the application was a "Canyon Lake East Bay Sediment Removal Project Description and Work Plan," ("Project Description") dated September 2003, prepared by PBS&J. This document provides a detailed description of the work to be done. It explains that the dredge is a self-propelled floating platform equipped with a diesel engine-powered centrifugal pump to remove the sediment from the lakebed. The dredged sediment is conveyed from the dredge to the dewatering site via a temporary 8-inch pipeline. The dredged sediment is dewatered by means of a solids concentrator and 33 gravity dewatering bins. The solids concentrator has three chambers with hopper bottoms, from which the thickened sediment is discharged through a piping manifold to the dewatering bins. The dewatering process increases the concentration of the dredged solids from approximately 15 percent solids by volume when dredged to over 90 percent solids by volume inside the gravity dewatering bins. The dewatering equipment is located at the eastern-most reach of the lake, near the boat launch facility, covering an area of approximately 1.4 acres. The equipment is laid out so that roll-off container trucks can be easily loaded for sediment hauling. The dewatered sediment is loaded onto the trucks, hauled to the Audie Murphy Ranch, and dumped. The Project Description states that a staff of five full-time employees was planned for the project: A supervisor, a dredge operator, two dewatering equipment operators, and a roll-off container truck driver.

On March 5, 2003, POA and Audie Murphy Ranch LLC entered into an "Agreement to Place Dredged Fill Material," which sets forth the terms and conditions under which POA is permitted to deposit the dredged material at the Audie Murphy Ranch. This agreement does not provide for either party to compensate the other, but expressly provides that Audie Murphy Ranch LLC shall incur no costs or liability arising from or in connection with the dredging work.

Discussion

Labor Code section 1771[1] generally requires the payment of prevailing wages to workers employed on public works. Section 1720(a)(1) defines public works to include: "Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds ... ." Additionally, section 1720.3 provides: "For the limited purpose of Article 2 (commencing with Section 1770), 'public works' also means the hauling of refuse from a public works site to an outside disposal location, with respect to contracts involving any state agency ... or any political subdivision of the state." Section 1772 provides that: "Workers employed by contractors or subcontractors in the execution of any contract for public work are

[1]Subsequent statutory references are to the Labor Code unless otherwise indicated.

deemed to be employed upon public work." Finally, under section 1774, such contractors or subcontractors "shall pay not less than the specified prevailing rates of wages to all work[ers] employed in the execution of the contract."

It appears to be undisputed that the dredging work entails alteration within the meaning of section 1720(a)(1). "To 'alter' is merely to modify without changing into something else," and that term applies "to a changed condition of the surface or the below-surface." *Priest v. Housing Authority* (1969) 275 Cal.App.2d 751, 756. "Alter" as defined by Webster's Third New International Dictionary (2002) at page 63 is "to cause to become different in some particular characteristic (as measure, dimension, course, arrangement, or inclination) without changing into something else." Thus, with regard to land, under these definitions to alter under section 1720(a)(1) is to modify a particular characteristic of the land. The dredging work involved here is performed by removing sediment from the bed of the lake with a self-propelled floating dredge. In so doing, the dredging modifies a particular characteristic of the land in that it expands the storage capacity of the lake and increases navigability. As such, the dredging work meets the definition of alteration within the meaning of section 1720(a)(1).

POA asserts that the Project is not being done "under contract" within the meaning of section 1720(a)(1). In support of this assertion, POA notes that no "contractors" are involved. Rather, POA is a private corporation using its own labor and equipment to dredge its own leased premises. According to POA, in order to satisfy the "under contract" element, the contract must contain a specification as to the minimum number of cubic yards of sediment to be dredged or the price to be charged for the hauling the dredged sediment, and there is no such contract specification here.

This contention must be rejected. The alteration is being done under two contracts: the agreement between the Board and LESJWA; and the agreement among LESJWA, POA and City (accurately characterized by LESJWA as "[t]he three-party contract"). The fact that these agreements may lack the above provisions mentioned by POA is immaterial to the status of the agreements as contracts. The fact that POA is a private corporation using its own labor and equipment is likewise immaterial. The same is true of most public works contractors. Here, contrary to POA's assertion that no contractors are involved, POA itself is acting in the capacity of a contractor.

LESJWA asserts that the Project does not meet the "under contract" element because it is not an "awarding body" within the meaning of section 1722 and this Department's regulations. Section 1720(a)(1) does not require a public entity to be party to a particular kind of contract, or any contract. *See* PW 98-005, *Goleta Amtrak Station* (November 23, 1998); PW 99-052, *Lewis Center for Earth Sciences Construction* (November 12, 1999). That section requires only that the alteration be done under contract, not that the contract be awarded by a public entity. The Attorney General has interpreted section 1720(a) as applying when public funds are used to reimburse construction costs irrespective of whether the construction contract was awarded by a public "awarding body." Op.Atty.Gen. No. 99-804 (83 Ops.Cal.Atty.Gen. 231, October 23, 2000) at pp. 4-5. *See also* PW 93-054, *Tustin Fire Station* (July 1, 1994). Accordingly, the Project entails alteration done under contract for purposes of section 1720(a)(1).

The third element of section 1720(a)(1)'s definition of "public works" is that the work is "paid for in whole or in part out of public funds." This Project is paid for in part out of public funds in the form of a $1.2 million payment from LESJWA. LESJWA argues that the Project is a private work of improvement and that partial funding from a grant of public funds does not make it a public work. The $1.2 million grant is unquestionably a payment of public funds within the meaning of section 1720(b)(1), which defines the phrase "paid for in whole or in part out of public funds" to include "[t]he payment of money or the equivalent of money." This is consistent with longstanding Department interpretation. *See, e.g.*, PW 2001-054, *Tauhindauli Park and Trail Project/City of Dunsmuir* (March 28, 2002) [when construction and alteration on public land leased to a private organization is paid for in part with grants of public funds, the project is a public work].

Citing PW 2001-021, *One Harbor Plaza, Suisun City Redevelopment Agency* (June 24, 2002), LESJWA argues that:

> Over its 8-year life, the dredging project is expected to cost more than $26 million, all of which the POA will be responsible for, except for the $1.2 million grant made by LESJWA to the POA. Thus, LESJWA's equity substantially exceeds its investment such that there is no net expenditure of "public funds" on this project. (Aklufi & Wysocki letter of July 15, 2005, at p.3.)

In this case, LESJWA has made no showing that it will realize *any* return on investment. The mere fact that POA is putting up most of the money does not mean that LESJWA will recoup the public funds it is paying. Moreover, even if there were a factual basis for LESJWA's argument, it would have no legal basis. The fact that a public entity might in future years derive revenue from a project would not negate the fact that the project was paid for out of public funds.

Thus, the Project meets all three elements of a public work under section 1720(a)(1). It involves alteration done under contract and paid for in part out of public funds. In addition to the alteration work involved in the dredging of the lakebed, the scope of work for the Project also includes the dewatering of the dredged material, the loading of the dredged material onto trucks and the off-hauling of the dredged material to the Audie Murphy Ranch. Whether any of this work is also subject to prevailing wage requirements turns on an analysis of sections 1771, 1772 and 1774.

Work falls within the scope of sections 1771, 1772 and 1774 when it is "functionally related to the process of construction" and "an integrated aspect of the 'flow' process of construction." *See* PW 2005-037, *Off-Site Testing and Inspection Services, Jurupa Unified School District – Glen Avon High School* (January 12, 2007), citing *O.G. Sansone Co. v. Dept. of Transportation* (1976) 55 Cal.App.3d 434, 444, quoting *Green v. Jones* (1964) 23 Wis.2d 551, 128 N.W.2d 1, 7. The same test applies to the "process of alteration." Here, both the dewatering of the dredged material and the loading of it onto trucks are functionally related to, and an integrated aspect of, the alteration process. The dredged sediment is immediately piped from the dredge to the dewatering equipment, and the dewatering bins are arranged so that the sediment can be promptly and easily emptied into trucks for off-hauling as soon as the dewatering is completed. The uninterrupted

operation of the dredge depends upon the dewatering of the dredged material and the emptying of the dewatering bins. Thus, the workers performing these tasks are deemed to be employed in the execution of the public works contract within the meaning of sections 1771, 1772 and 1774.

Regarding the off-hauling of the dredged material, a further analysis is required. In *O.G. Sansone v. Dept. of Transportation, supra,* 55 Cal.App.3d 434, the Court of Appeal analyzed the circumstances in which prevailing wages must be paid for *on-hauling* work. As stated in PW 2004-023, *Richmond-San Rafael Bridge/Benica-Martinez Bridge/San Francisco-Oakland Bay Bridge* and PW 2003-046, *West Mission Bay Drive Bridge Retrofit Project, City of San Diego* (July 31, 2006) ("*Towboats*"): "*Sansone* stands for the proposition that prevailing wages are to be paid for hauling to a public works site based on the individual worker's 'function' (whether the hauling is from a dedicated site or the hauler is involved in the immediate incorporation into the site of the materials hauled) . . . ." By similar logic, workers engaged in *off-hauling* from a public works site generally are not engaged in the execution of the public works contract within the meaning of sections 1771, 1772 and 1774 unless the off-hauling work is "functionally related to the process of construction" and "an integrated aspect of the 'flow' process of construction." *O.G. Sansone Co. v. Dept. of Transportation, supra,* 55 Cal.App.3d 434, 444, quoting *Green v. Jones, supra,* 23 Wis.2d 551, 128 N.W.2d 1, 7.

Thus, only under the following limited exceptions is off-hauling work subject to prevailing wage requirements. Hauling within a single public works site is subject to prevailing wages, whether it is for the purpose of hauling materials, personnel, tools or equipment, because such work is closely tied to the construction process by virtue of the fact that it is performed on-site. Hauling from a public works site to a temporary, adjacent site set up for and dedicated to the public works site is subject to prevailing wages for the same reason that on-hauling from a temporary, adjacent dedicated site such as a batch plant or borrow pit was found to be subject to prevailing wages under *Sansone*. Hauling from one public works site to a second public works site is subject to prevailing wages because the first site is similar in function to the temporary, adjacent dedicated site under *Sansone*. Finally, prevailing wages are required for any work done by haulers participating in the construction process on the public works site, but not for off-hauling from the site. As *Towboats, supra,* found, "when the hauler leaves the pure hauling role and participates in the on-site construction activity of incorporation of the material hauled, the worker is entitled to prevailing wages." The inverse proposition is equally true. When the hauler leaves the pure hauling role and participates in the on-site alteration or demolition process of "de-incorporation" such as when trucks are staged and loaded as material or debris is being excavated or removed from the public works site, the worker is similarly entitled to prevailing wages for such on-site work.[2]

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[2]The precedential Decision on Administrative Appeal in PW 2003-049, *Williams Street Widening, City of San Leandro* (August 23, 2005) affirmed the initial determination of January 6, 2005 regarding coverage of off-haul work. The January 6, 2005 determination has since been de-designated as precedential. The determination herein reiterates the Department's longstanding view, as expressed in *Williams Street Widening*, that off-hauling is generally not covered; it does not, however, carry forward the following two exceptions enumerated in *Williams Street Widening*: (1) "where there is a specification in a contract that the hauling be accomplished in a specific manner or to a specific location;" and (2) "where the hauling is to return such things as tools, equipment or materials to the contractor's facility." These

Here, the dredged material is being hauled to the Audie Murphy Ranch, a private development site, to be used as clean fill. The off-hauling from the public works site at Canyon Lake to the Audie Murphy Ranch does not constitute work done in the execution of the public works contract because it does not fall under any of the exceptions noted above. The off-hauling is not within a single public works site; it is not to a temporary dedicated, adjacent site; and, it is not to a second public works site.[3]

In addition, the Legislature made another exception to the general rule against coverage of off-hauling by enacting section 1720.3 to define as public works the off-hauling of refuse from a public works site to an outside disposal location. The American Heritage Dictionary of the English Language (New College Ed. 1979 at p. 1095) defines "refuse" as: "Anything discarded or rejected as useless or worthless; trash; rubbish."[4] Here the dredged material is not being discarded as useless or worthless because it is being put to use as clean fill. Presented with a similar factual situation, the Department determined that: "Because the dirt excavated ... is being put to a useful purpose, i.e., the covering of the garbage at the landfill sites, it would not be considered refuse under these circumstances. A fact that clearly supports this conclusion is that [contractor] was not charged for dumping the dirt at the landfills." PW 2000-078, *Rosewood Avenue/Willoughby Avenue Sewer Interceptor, City of Los Angeles* (August 6, 2001).[5] Here, too, the fact that POA is not being charged to dump the dredged material at the Audie Murphy Ranch strongly supports the conclusion that the material is not refuse. Accordingly, the off-hauling of the material does not fall within section 1720.3's definition of "public works."

POA contends that the Project is exempt from prevailing wages under section 1720(c)(3), which states:

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two exceptions are inconsistent with the principles set forth in *Sansone* that the hauling be functionally related to, and integrated with, the construction process in order for it to be subject to prevailing wages. Therefore, the Decision on Administrative Appeal in *Williams Street Widening* is also de-designated as precedential. Accordingly, it will no longer be followed by the Director and should no longer be considered guidance by the regulated public after the date of this determination.

[3] To the extent, if any, the roll-off container truck driver leaves the pure hauling role and participates in on-site activities such as loading the dredged material onto the roll-off container truck, such on-site work performed by the truck driver is subject to prevailing wages even though the off-hauling performed by the same truck driver is not.

[4] This Department has long used the above definition. *See* PW 99-059, *Route 30 Asbestos Pipe Removal Project, California Department of Transportation* (March 20, 2000). *See also* PW 2000-036, *Carlson Property Site Lead Affected Soil Removal and Disposal Project* (May 31, 2000): "Refuse is defined as 'the worthless or useless part of something' (Webster's Third New International Dictionary (3d ed. 1967) p. 1910)."

[5] The *Rosewood Avenue* determination found that the off-hauling of the dirt to landfills did not meet section 1720.3's definition of public works because the material did not meet the definition of refuse. The off-hauling was found to be nonetheless subject to prevailing wages for it was deemed performed in the execution of the public works contract under section 1772. Given the conclusions reached herein that off-hauling generally is not done in the execution of a public works contract unless it falls within the limited exceptions noted above, *Rosewood Avenue's* discussion of section 1772 as it relates to off-hauling, and any similar discussion of section 1772 in other precedential determinations, is disavowed.

> If the state or a political subdivision reimburses a private developer for costs that would normally be borne by the public, or provides directly or indirectly a public subsidy to a private development project that is de minimis in the context of the project, an otherwise private development project shall not thereby become subject to the requirements of this chapter.

POA argues that the first exception of the above provision applies because the cost of the Project would normally be borne by the public. It also contends that the second exception applies because LESJWA's payment constitutes only 4.63 percent of the total cost and, therefore, "is de minimis in the context of the project." LESJWA makes a similar "de minimis" argument.

Neither POA nor LESJWA has provided any legal authority for their assertions that the terms "private developer" and "private development project" are applicable to the facts at hand. Webster's Third New International Dictionary (2002), at page 618, defines "developer" as:

> [A] person who develops something, esp. habitually or as an occupation: as ... b: a person who develops real estate, often one that improves and subdivides land and builds and sells residential structures thereon ... .

The Legislature obviously used the phrase "private developer" to refer to one who builds structures on real estate. POA is acting in the role of a contractor, not a developer. Webster's Third New International Dictionary, *supra*, provides several definitions of "development." The one most relevant to public works is: "[A] developed tract of land, esp. a subdivision having necessary utilities (as water, gas, electricity, roads)." The dredging of a lakebed does not fall within this definition, and is not a "development project" within the meaning of section 1720(c)(3). Moreover, the Project cannot be deemed purely private given that the lakebed is owned by a public entity and the dredging serves the public purpose of expanding the storage capacity of the lake. Accordingly, the exceptions set forth in section 1720(c)(3) do not apply, and it is therefore unnecessary to determine whether or not the public funding involved here is a reimbursement for "costs that would normally be borne by the public" or is "de minimis in the context of the project."

Conclusion

For the foregoing reasons, this Project entails alteration done under contract and paid for in part out of public funds. Thus, the Project is a public work subject to prevailing wage requirements with the exception of the off-hauling of the dredged sediment. The off-hauling is not done in the execution of a contract for public work within the meaning of sections 1771, 1772 and 1774; it does not meet the definition of "public works" within the meaning of section 1720.3; therefore, the off-hauling is not subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

John M. Rea
Acting Director

EXHIBIT F

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

RE: PUBLIC WORKS CASE NO. 2005-025

CANYON LAKE DREDGING PROJECT

LAKE ELSINORE AND SAN JACINTO WATERSHEDS AUTHORITY

I. INTRODUCTION

On June 26, 2007, the Acting Director of the Department of Industrial Relations ("Department") issued a public works coverage determination ("Determination") finding that the Canyon Lake Dredging Project ("Project") constitutes a public work subject to prevailing wage requirements, except for certain off-hauling work.

On July 25, 2007, the Canyon Lake Property Owners Association ("POA") filed an administrative appeal contesting that portion of the Determination finding the Project to be a public work. Also on July 25, 2007, the Southern California Labor/Management Operating Engineers Contract Compliance Committee ("Compliance Committee") filed an administrative appeal contesting that portion of the Determination concerning the off-hauling work.

In its appeal, POA requests a hearing. California Code of Regulations, title 8, section 16002.5(b) provides that the decision to hold a hearing is within the Director's sole discretion. While the parties have raised some additional facts in their appeals, the material facts are undisputed. Because the issues raised in the appeal are predominantly legal ones, no hearing is necessary. This appeal, therefore, is decided on the basis of the administrative record, and the request for hearing is denied.

All of the submissions have been considered carefully. Except as noted below, they raise no new issues not already addressed in the Determination. For the reasons set forth in the Determination, which is incorporated herein except for the discussion of off-hauling, and for the additional reasons stated below, the appeal of POA is denied. The

Determination is affirmed as to all issues except coverage of off-haul. With respect to off-haul, the appeal of the Compliance Committee is granted. The off-haul portion of the Determination is reversed.

II. FACTS

The facts as set forth in the Determination are incorporated herein by reference. Some additional facts were obtained on appeal, which are summarized as follows.

Canyon Lake is a man-made reservoir owned and operated by the Elsinore Valley Municipal Water District ("EVMWD"). EVMWD leases Canyon Lake to POA. POA is a homeowner's association - a non-profit mutual benefit corporation comprised of Canyon Lake homeowners.[1] As a homeowner's association, POA's purpose is "to preserve, protect and police the commonly owned facilities and covenants, conditions and restrictions and agreements" governing its members.[2] The lease gives POA the right to use the surface of the lake for recreational and boating purposes. EVMWD retains the right to use the lake as a storage reservoir for agricultural and domestic water.

In 2000, EVMWD and other governmental entities[3] entered into a joint powers agreement creating the Lake Elsinore and San Jacinto Watersheds Authority ("LESJWA") in order to manage funds granted by the state pursuant to Proposition 13, which was passed by the voters in 2000.[4] In 2003, LESJWA contracted with the State Water Resources Control Board to use Proposition 13 funds to rehabilitate and improve the Lake Elsinore Watershed and the San Jacinto Watershed, and the water quality of Lake Elsinore. Task Orders No. 8 and No. 8.1, which were issued pursuant to this contract, specified that the scope of work to be done by LESJWA included the dredging of the bottom of Canyon Lake and the removal, dewatering and disposal of the dredged

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1 POA is governed by Articles of Incorporation dated May 3, 1968, and by accompanying bylaws, rules and regulations.

2 POA Articles of Incorporation, Art. II. The commonly owned facilities include a golf course, a clubhouse and a restaurant/bar.

3 These entities were City of Canyon Lake, City of Lake Elsinore, County of Riverside, Riverside County Flood Control and Water Conservation District, and Santa Ana Watershed Project Authority.

4 Proposition 13 is the Safe Drinking Water, Clean Water, Watershed Protection and Flood Protection Bond Act of 2000.

sediment. In 2004, LESJWA, as program manager for $15 million in Proposition 13 funds, contracted with POA to carry out the work specified in those task orders - work which would otherwise have been the responsibility of LESJWA to perform. Of the estimated $26 million cost of the Project, LESJWA is contributing approximately $1.2 million, which POA has used to buy the necessary dredging equipment.

The purpose of the Project is twofold. POA is performing the work in order to improve the navigability of the lake. Only the perimeter of the lake is being dredged. The dredging will deepen the water in the shoreline areas surrounding docks. At present, the buildup of silt has made some areas too shallow to launch boats. In addition, the purpose for which LESJWA wanted the work performed – and the reason Proposition 13 funds are being used – is that the work will improve water quality. A declaration provided by LESJWA states that the sediment is contaminated by phosphorus from fertilizers. The contract between LESJWA and POA specifies that the water quality in neighboring Lake Elsinore will be improved by dredging the sediment in Canyon Lake.[5] The dual purpose of the Project is confirmed by Task Order No. 8, which states that Canyon Lake was an "impaired water body for nutrients, pathogens and sedimentation/siltation. The reduction of sediments is anticipated to improve water quality and increase recreational use."[6]

Based on the "Canyon Lake East Bay Sediment Removal Project Description," the Determination stated that the dredging was done with a self-propelled floating platform equipped with a diesel engine-powered centrifugal pump to remove the sediment from the lakebed. The dredged sediment was conveyed from the dredge to the dewatering site via a temporary 8-inch pipeline. The dredged sediment was dewatered by means of a solids concentrator and 33 gravity dewatering bins. The solids concentrator had three chambers with hopper bottoms, from which the thickened sediment is discharged through a piping manifold to the dewatering bins. The dewatering process increased the concentration of

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[5] This contract specifies that "After study, the Board of Directors of LESJWA found and determined that the water quality in Lake Elsinore would be improved if the bottom of Canyon Lake was dredged of silt that has accumulated as the result of stormwater inflows to the Lake."

[6] As illustrated above, POA's statement that the sole purpose of the Project is to benefit private individuals for a private purpose is not supported by the administrative record. If true, that might raise the issue whether the use of Proposition 13 monies to fund the Project constitutes an unlawful gift of public funds. See, e.g., Cal. Const., Art. 16, § 6.

the dredged solids from approximately 15 percent solids by volume when dredged to over 90 percent solids by volume inside the gravity dewatering bins. The dewatering equipment was located at the eastern-most reach of the lake, near the boat launch facility, covering an area of approximately 1.4 acres. The equipment was laid out so that roll-off container trucks can be easily loaded for sediment hauling. The dewatered sediment was loaded onto the trucks. Pursuant to Task Orders No.8 and No. 8.1: "The dewatered sediment [was to] be hauled to the Audie Murphy Ranch development for disposal."

POA now states, however, that:

> The dredging process did not proceed as planned. There were many false starts and delays. The initial dredging plan was described in the Sediment Removal Plan referenced in the ... Determination. The actual dredging work was not performed in accordance with that plan. The initial plan called for using belt presses to dry out the dredged material and depositing the material directly into a truck bed. But after months of trying and the purchase of additional equipment (paid for by the Association), it was determined that method would not work. So, the Association abandoned the belt press method, purchased ten dewatering bins ... and pumped the dredged material through a solids concentrator and from there to the dewatering bins. The dredged material was then taken from the dewatering bins and stored on site.
>
> In the meantime, Audie Murphy Ranch had been very hesitant about accepting any fill. Then the issue of the need for a stockpile permit arose. As a result, the Association ended up keeping the vast majority of the dredged material on site. The Association applied for the stockpile permit for the Audie Murphy project, but before it was issued the Association suspended the dredging project given the initial determination that the project was a public work.
>
> All together, the Association estimates it hauled no more than 100 truckloads of dredged material to Audie Murphy Ranch, or about 500 yards. The truckloads were delivered to different locations throughout the Audie Murphy Project, as directed by Audie Murphy employees. The remainder of the dredged material remains on site at the Association. ... The Association ... currently plans to use some of the dredged material for various Association owned private parks within the community. The Association is also exploring grading the majority of the material on site for use in connection with the existing private boat launch and related facilities.[7]

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7 Fiore, Racobs & Powers letter of December 28, 2007, at pp. 2-3.

III. DISCUSSION

A. The Dredging Work Constitutes Alteration.

As stated in the Determination, Labor Code section 1771[8] generally requires the payment of prevailing wages to workers employed on public works. Section 1720(a)(1) defines public works to include: "Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds ... ." In its appeal, POA contends for the first time that the dredging operation is not alteration because it is not routine and does not permanently change or alter any characteristics of the lake.[9] Rather, POA argues, the dredging work is analogous to sweeping up dirt that has accumulated on a floor for 20 or 30 years.

POA's purpose for the Project is to enhance the recreational use of the lake. Dredging and removing silt at the perimeter of the lake will make the docks deeper so that it is easier for residents to dock and launch their boats. In addition, the stated purpose of the public funding source for this Project – Proposition 13 – is to improve water quality. POA concedes that the Project will have some benefit to regional water quality, although POA insists that is not the reason it agreed to do the Project.

POA's intent does not determine whether the work is alteration. Alteration, within the meaning of *Priest v. Housing Authority* (1969) 275 Cal.App.2d 751, 756,

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[8] Subsequent statutory references are to the Labor Code unless otherwise indicated.

[9] While this matter was pending, the Department decided it would no longer designate public works coverage determinations as "precedential" under Government Code section 11420.60. Consequently, PW 2005-026, *San Bernardino Fire Department Tree Removal Project*, Decision on Appeal (July 28, 2007), which was cited to and argued by POA, no longer has precedential effect. While *San Bernardino Fire Department Tree Removal* provided a useful analytical tool to assist in ascertaining whether a type of work constitutes alteration under section 1720(a)(1), the factual analysis set forth here accomplishes the same purpose. Public notice of the Department's decision to discontinue the use of precedent decisions can be found at www.dir.ca.gov/DLSF/09-06-2007(pwcd).pdf. Notwithstanding the discontinuation of precedent decisions, *San Bernardino Fire Department Tree Removal* is factually distinguishable. The work involved the removal of selected diseased or dying pine trees from a forest, leaving healthy pines and other species of trees intact. The work did not change the character of the forest. As such, the Acting Director correctly found that the tree felling and removal work did not constitute alteration within the meaning of section 1720(a)(1) as interpreted by *Priest v. Housing Authority, supra,* 275 Cal.App.2d 751. Here, the dredging work will change the character of the lake in two ways. It will improve navigability. Boats that could not be launched will now be able to. Water quality of both Canyon Lake and Lake Elsinore will be improved as well. The Department has consistently found dredging work such as the kind performed here to constitute alteration within the meaning of section 1720(a)(1). See *Dredging work for Sacramento Area Reclamation District* (July 23, 1987); see also PW 94-019, *Port of Los Angeles Spec. No. 2457 Pier 400 Dredging and Landfill Project* (June 28, 1994).

means to modify a particular characteristic of the land.[10] Contrary to POA's argument, it is not necessary that a change in a characteristic of the land be permanent in order for the work involved to constitute alteration under the *Priest* definition. Also contrary to its argument, section 1720(a) does not require alteration to be routine in nature.[11] Clearly this Project modifies a particular characteristic of the land, in that it improves both the navigability and the water quality of the lake. Accordingly, the work is alteration within the meaning of *Priest v. Housing Authority* (1969) 275 Cal.App.2d 751, 756.

B. The Dredging Work Is Being Done Under Contract And Paid For In Part Out Of Public Funds.

POA quotes the following statement in *Greystone v. Cake* (2005) 135 Cal.App.4th in arguing against coverage of the Project: "if the 'public funds' are not contracted for or used to pay for actual 'construction,' as that term is defined by statute, the project is not a public work." Based on this statement, POA makes two arguments: first, that the dredging work was not done under contract; second, that the work was not paid for out of public funds. POA conflates two issues. *Greystone* did not hold that the construction work in question was not done "under contract" within the meaning of former section 1720(a); it held that that the construction was not paid for out of public funds.

POA has cited no evidence in support of its assertion that the work in question was not done under contract. As discussed above, LESJWA contracted with the State Water Resources Control Board to dredge the lake, and subsequently entered into a contract with POA, under which the latter was obligated to perform the work. The fact that some of the work ultimately entailed different methods than those originally contemplated does not change the fact that it was done under contract. The "under contract" element of section 1720 plainly is satisfied. See *Bishop v. City of San Jose*

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[10] This definition is set forth in detail in the Determination.

[11] POA cites PW 2005-026, *San Bernardino Fire Department Tree Removal Project*, Decision on Appeal, (July 28, 2007) in support of its argument that the dredging work must be "routine" for it to be alteration. POA is confusing alteration with maintenance. Maintenance is defined by regulation as work of a "routine, recurring and usual" nature. Cal. Code Regs., tit. 8, § 16000. In the instant case, although the Compliance Committee raised the issue of maintenance as an alternative theory in its request for determination, the Determination did not did not decide that issue, and it is unnecessary to decide it here. Decision on Administrative Appeal, however, does not raise the issue of maintenance work.

(1969) 1 Cal.3d 56, 63-64 ("under contract" language in § 1771, the section imposing prevailing wage obligations on public works projects over $1,000, refers to work done under contract as opposed to work carried out by a public agency with its own forces).

As for POA's argument that under *Greystone* the construction was not paid for out of public funds, POA contends that because it used the public funding it received only to purchase the dredge and related equipment, the funds were not ultimately "used for construction" within the meaning of section 1720(a)(1). *Greystone* is inapposite, however. In *Greystone,* the court characterized the "dispositive question" after *City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942,[12] to be "whether *actual construction* ... was paid for in whole or in part out of public funds." *Greystone Homes, Inc., supra,* 135 Cal.App.4th at p. 10 (emphasis in original). The court held that public funds used to pay for land acquisition costs of the project did not constitute payment for construction. Accordingly, the project was not a public work. *Id.* at p. 13. In *City of Long Beach,* however, a fact central to the outcome was that the contract with the public entity required that public funds be placed in a segregated account and used only for expenses related to project development, such as permit fees and "design and related preconstruction costs." *City of Long Beach, supra,* 34 Cal.4th at p. 946. The court held that payment for such "preconstruction" activities did not constitute payment for construction under the former language of section 1720(a). *Id.* at pp. 953-954.

Here the contract did not earmark the public funds for non-construction activities, nor did it earmark them for purchase of the dredge. That contract simply required that POA perform the dredging in return for the public funds it received. The

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12 In *City of Long Beach, supra,* the project was a private animal shelter. The City contributed funds to the project that were earmarked for project development, design and related *preconstruction* costs, including architectural design costs and surveying fees. When the City entered into the contract in 1998 to contribute money to assist in the development and preconstruction phases of the shelter, "construction" was not defined in the statute. The Court held that payment of public funds for *pre-construction activities* did not constitute payment for "construction." (After the contract was entered into in *City of Long Beach,* the Legislature passed Senate Bill 1999 in 2000, effective January 1, 2001, amending section 1720(a) to specifically include design and preconstruction phases of construction, including inspection and surveying, in the definition of construction. The Court determined that this amendment changed existing law and operated prospectively only. *City of Long Beach, supra,* 34 Cal.App.4th at p. 951.)

fact that a public works contractor chooses to purchase equipment with the public funds it receives does not mean that the payment is not for construction.

Moreover, *City of Long Beach* and *Greystone* addressed the language of *former* section 1720(a), rather than the present statutory language. A determination whether the Project is "paid for in whole or in part out of public funds" requires an analysis of section 1720(a) as amended in 2001 by Senate Bill 975 ("SB 975"), which is the law applicable to the Project.[13]

SB 975 went into effect on January 1, 2002. Prior to 2002, section 1720(a) provided only that construction was a "public works" if "paid for in whole or in part out of public funds." In SB 975, the Legislature added subsection (b), which defines "paid for in whole or in part out of public funds," and subsection (c), which exempts certain development projects from the coverage of the prevailing wage laws even though there may be public subsidies involved that would otherwise render such projects public works.

Section 1720(a)(1) still provides in relevant part that "construction ... paid for in whole or in part out of public funds" is "public works." By defining "paid for in whole or in part out of public funds" to mean the public subsidies listed in 1720(b) subparts (1) – (6), the Legislature has determined that construction is paid for out of public funds where a public entity contributes one or more such subsidies to a project.

Among the enumerated forms of public subsidies to a project in section 1720(b) are subsidies that cannot be used to directly pay for the cost *of* construction, and yet the Legislature nevertheless has determined these subsidies to be payment *for* construction. These subsidies include: a public entity's performance of construction work - 1720(b)(2); a public entity's transfer of an asset, such as real property, for below fair market price - 1720(b)(3); a public entity's waiver or payment of fees, costs, rents, insurance or bond premiums - 1720(b)(4); and a public entity's allowance of credits against repayment obligations - 1720(b)(6). Thus, under the current provisions of section 1720, construction is a public work subject to prevailing wage requirements where there is a public subsidy to a project even though the public subsidy does not pay for actual construction. Thus,

[13] The applicable statutory law is the law in effect on the date on which the parties entered into the operative Agreement for the Canyon Lake Dredging Project, July 15, 2004.

POA's reliance on *Greystone,* which arose under the pre-SB 975 version of section 1720, is misplaced.

Turning to the facts of this case, dredging of the lake, as mentioned above, qualifies as alteration done under contract. The question presented here is whether the alteration is "paid for in whole or in part out of public funds." The answer turns on whether there is a public subsidy to the Project within the meaning of section 1720(b). Here there is a "payment of money ... by the state or political subdivision directly to ... the public works contractor, subcontractor, or developer" within the meaning of section 1720(b). Therefore, the Project is a public work subject to prevailing wage requirements.

C. The Project Is Not Excepted From Coverage As A Public Work Under Section 1720(c)(3).

POA argues that the Project is excepted from coverage as a public work under section 1720(c)(3), which provides:

> If the state or a political subdivision reimburses a private developer for costs that would normally be borne by the public, or provides directly or indirectly a public subsidy to a private development project that is *de minimis* in the context of the project, an otherwise private development project shall not thereby become subject to the requirements of this chapter.

Exceptions to a statute are to be strictly construed. *City of Lafayette v. East Bay Mun. Utility Dist.* (1993) 16 Cal.App.4th 1005, 1017.

POA contends that it is a private developer engaged in an otherwise private development project within the meaning of section 1720(c)(3). Statutes must be interpreted "according to the usual, ordinary import of the language employed in framing them." *Dubois v. WCAB* (1993) 5 Cal.4th 382. The California Court of Appeal has defined "develop," in the context of real estate improvements, as "to convert from a tract of raw land into an area suitable for residential or business uses... A developer has the overall control over the development of a 'tract of raw land' and the myriad of improvements to the land which eventually complete the development." *Liptak v. Diane Apartments, Inc.* (1980) 109 Cal.App.3d 762, 770-771. *Liptak* further contrasts development with the lesser work of improvement: "[a] person contributing to 'an

improvement' carries out only one of many steps towards completion of the development." *Id.* at 771.

POA is a homeowners association, not a developer. The purpose of the POA is to maintain the common areas of the community and to enforce the covenants, conditions and restrictions governing its member homeowners. Unlike a developer, it is not building a new community on a tract of empty land. Rather, POA collects dues from its constituent homeowners and uses the money to alter, maintain and improve the amenities and common areas of the community, such as a clubhouse, a golf course and the lake. POA is not "developing" the lake in that it is not creating a new lake as part of a larger scheme of construction. Rather, it is, at most, improving an existing lake, which is owned by a public entity, in order to benefit its members. Moreover, POA did not undertake this Project as a private entity acting on its own behalf, but rather as a contractor for a political subdivision of the state. Accordingly, the exception for private developers afforded by section 1720(c)(3) does not apply.

The legislative comment to SB 975, which enacted the relevant portion of section 1720(c)(3), states "This bill would provide that certain private residential housing projects and development projects built on private property are not subject to the prevailing wage, hour, and discrimination laws that govern employment on public works projects." 2001 Ch. 938, SB 975. This language reinforces the notion that the Legislature intended the section 1720(c)(3) exemption to apply to traditional development projects where new homes or structures are being built on undeveloped land. That is not the case here.

Moreover, in light of the fact that POA is carrying out a public purpose on public property, pursuant to a contract with public entities, POA's contention that the Project is an "otherwise private development project" within the meaning of section 1720(c)(3) must be rejected.

Because POA is not a private developer and the Project is not an otherwise private development project, the exception in section 1720(c)(3) does not apply. Therefore, the issue of whether public funding for the project was *de minimis* need not be addressed.

D. The Off-Hauling Was Done In The Execution Of The Public Works Contract And Is Therefore Subject To Prevailing Wage Requirements.

The Determination found that the off-hauling of the dredged material is not done in the execution of the public works contract and therefore is not subject to prevailing wage requirements. Citing the analysis in *O.G. Sansone Co. v. Dept. of Transportation*, *supra,* 55 Cal.App.3d 434, the Determination stated that off-hauling work is generally not subject to those requirements, and that prevailing wages must be paid only under the following limited exceptions:

> Hauling within a single public works site is subject to prevailing wages, whether it is for the purpose of hauling materials, personnel, tools or equipment, because such work is closely tied to the construction process by virtue of the fact that it is performed on-site. Hauling from a public works site to a temporary, adjacent site set up for and dedicated to the public works site is subject to prevailing wages for the same reason that on-hauling from a temporary, adjacent dedicated site such as a batch plant or borrow pit was found to be subject to prevailing wages under *Sansone.* Hauling from one public works site to a second public works site is subject to prevailing wages because the first site is similar in function to the temporary, adjacent dedicated site under *Sansone.* Finally, prevailing wages are required for any work done by haulers participating in the construction process on the public works site, but not for hauling time off the site.

Because the off-hauling in this case does not fall within any of the above exceptions, the Determination concluded that it is not subject to prevailing wage requirements.

At the time the Determination was issued, there were no California judicial decisions addressing the issue of prevailing wage requirements for off-hauling; *Sansone* involved only on-hauling of materials to a public works site. That situation changed significantly when the First District Court of Appeal issued its decision in *Williams v. SnSands Corporation* (2007) 156 Cal.App.4th 742. *Williams* began its analysis by interpreting the statutory term "execution":

> In determining legislative intent, courts are required to give effect to statutes according to the usual, ordinary import of the language employed in framing them. [Citations and quotation marks omitted.] The familiar meaning of "execution" is "the action of carrying into effect (a plan, design, purpose, command, decree, task, etc.); accomplishment" (5 Oxford English Dict. (2d ed.1989) p. 521); "the act of carrying out or putting into

> effect," (Black's Law Dict. (8th ed.2004) p. 405, col. 1); "the act of carrying out fully or putting completely into effect, doing what is provided or required." (Webster's 10th New Collegiate Dict. (2001) p. 405.) Therefore, the use of "execution" in the phrase "in the execution of any contract for public work," plainly means the carrying out and completion of all provisions of the contract.
>
> The analysis in O.G. Sansone Co. v. Department of Transportation, supra, 55 Cal.App.3d 434, 127 Cal.Rptr. 799 (*Sansone*) of who is, and who is not, a subcontractor obligated to comply with the state's prevailing wage law also informs our assessment of the intended reach of the prevailing wage law to "[w]orkers employed ... in the execution of any contract for public work." (§ 1772.)

Id. at pp. 749-750.

Sansone, as interpreted by *Williams*, 156 Cal.App.4th at p.752, recognized a "delivery exemption" from prevailing wages for bona fide material suppliers. This exemption does not apply to employees of the construction contractors. Under *Williams*, employees of construction contractors who are carrying out and completing the provisions of the public works contract are entitled to payment of prevailing wages under section 1772. Such work is deemed performed "in the execution of" the contract.

In relying on *Sansone*, and without the benefit of *Williams*, the Determination analyzed coverage of the off-haul work as though it were being performed by employees of a material supplier, rather than employees of a construction contractor. For this reason, the coverage analysis, below, as to off-haul can no longer be relied upon.

Here, the off-hauling was performed by an employee of POA, which was acting in the capacity of a public works contractor. The contract specified that POA was responsible for off-hauling the dredged material; moreover, the contract specified the location to which it was to be transported, the Audie Murphy Ranch development.[14] Thus, the off-hauling was necessary to the carrying out and completion of all provisions

[14] Task Orders No. 8 and No. 8.1 provided in part that: "The dewatered sediment will be hauled to the Audie Murphy Ranch development property for disposal. Other land development sites may be used for disposal of dewatered sediment."

of the contract, and was done in the execution of the public works contract within the meaning of section 1772.[15]

The facts and analysis herein are consistent with the determination in PW 1999-081, *Granite Construction Company*, in which the public works contract obligated the contractor to remove the excavated material and a portion of the off-haul work was performed by contractor himself, and with *Rosewood Avenue/Willoughby Avenue Sewer Interceptor, City of Los Angeles* (August 6, 2001), in which the off-haul was functionally related to the construction activity. Both determinations were endorsed by the *Williams* Court as correctly reasoned.

POA nonetheless argues that the off-hauling was not done in the execution of the contract, apparently on the basis that most of the dredged material ultimately was not hauled to the Audie Murphy Ranch. However, the changed circumstances do not negate the fact that the task orders incorporated into POA's contract did, in fact, specify that the material was to be transported there. Thus, under the *Williams* analysis, the off-hauling is a necessary part of the carrying out and completion of all provisions of the contract. Such off-hauling as actually occurred, therefore, was done in the execution of the contract, and is subject to prevailing wage requirements.

IV. CONCLUSION

In summary, for the reasons set forth in the Determination, as augmented and modified by this Decision on Administrative Appeal, the POA appeal is denied and the Compliance Committee appeal is granted. This Decision constitutes the final administrative action in this matter.

Dated: 3/28/08

John C. Duncan, Director

[15] The circumstances under which off-haul work performed by employees of independent trucking companies, rather than employees of the construction contractor, would be covered under *Williams* will be addressed in a different case where those facts are present. Relevant factors include: whether the transport was required to carry out a term of the public works contract; whether the work was performed on the project site or another site integrally connected to the project site; whether work that was performed off the actual construction site was nevertheless necessary to accomplish or fulfill the contract. *Id.* at p. 752.

[PROPOSED]

ORDER GRANTING MOTION FOR JUDICIAL NOTICE

Good cause appearing,

IT IS HEREBY ORDERED that Respondents Fonseca McElroy Grinding Co., Inc.'s and Granite Rock Company's Supplemental Motion for Judicial Notice in Support of Respondents' Answer to Amicus Curiae Brief of DLSE is GRANTED. IT IS ORDERED that this Court shall take judicial notice of the following items, copies of which are attached as Exhibits A-F to Respondents' Supplemental Motion for Judicial Notice:

1. The DIR coverage opinion letter, dated March 4, 2003, in Public Works Case No. 2002-064, *Off-Site Fabrication by Helix Electric*, signed by Acting DIR Director Chuck Cake.

2. The DIR coverage opinion letter, dated March 4, 2003, in Public Works Case No. 2000-027, *Cuesta College/Offsite Fabrication of Sheet Metal Work*, signed by Acting DIR Director Chuck Cake.

3. The DIR coverage opinion letter, dated November 13, 2008, in Public Works Case No. 2007-008, *Russ Will Mechanical, Inc. Off-Site Fabrication of HVAC Components*, signed by Director John C. Duncan.

4. The DIR Decision on Administrative Appeal Re: Public Works Case No. PW 2007-008, *Russ Will Mechanical, Inc. Off-Site Fabrication of HVAC Components*, dated May 3, 2010 and signed by Director John C. Duncan.

5. The DIR coverage opinion letter, dated June 26, 2007, in Public Works Case No. 2005-025, *Canyon Lakes Dredging Project Lake Elsinore and San Jacinto Watersheds Authority*, signed by Acting Director John M. Rea.

6. The DIR Decision on Administrative Appeal Re: Public Works Case No. 2005-025, *Canyon Lakes Dredging Project Lake Elsinore and San Jacinto Watersheds Authority*, dated March 28, 2008 and signed by Director John C. Duncan.

Dated: _____ By: _____
Chief Justice of the
Supreme Court of California

PROOF OF SERVICE

I, Estelle M. Franklin, am employed in the County of San Mateo, California. I am over the age of 18 years and not a party to the within action. My business address is 601 Gateway Boulevard, Suite 950, South San Francisco, California 94080. On February __, 2020, I served the **RESPONDENTS' SUPPLEMENTAL MOTION FOR JUDICIAL NOTICE** by mailing a copy by first class mail in separate envelopes addressed as follows:

United States Court of Appeals for the
Ninth Circuit
The James R. Browning Courthouse
95 7th Street
San Francisco, CA 94103
Tel: (415) 355-8000

Case No.: 17-15221

Hon. William H. Orrick
District Judge
United States District Court for the
Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94102
Tel: (415) 522-2000

Case No.: 3:15-cv-05143-WHO

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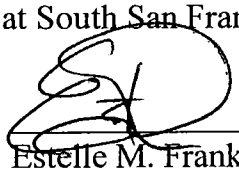
I am readily familiar with the practice of this business for collection and processing of documents for mailing with the United States Postal Service. Documents so collected and processed are placed for collection and deposit with the United States Postal Service that same day in the ordinary course of business. The above-referenced document(s) were placed in (a) sealed envelope(s) with postage thereon fully prepaid, addressed to each of the below listed parties and such envelope(s) was (were) placed for collection and deposit with the United States Postal Service on the date listed below at South San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 13, 2020, at South San Francisco, California.



Estelle M. Franklin